TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 92

BERWIND-WHITE COAL MINING COMPANY, PLAINTIFF IN ERROR,

vs.

CHICAGO AND ERIE RAILROAD COMPANY.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

FILED JANUARY 7, 1913.

(23,490)

(23,490)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 915.

BERWIND-WHITE COAL MINING COMPANY, PLAINTIFF IN ERROR,

vs.

CHICAGO AND ERIE RAILROAD COMPANY.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 8, 1913.

a

Transcript of Proceedings.

The Municipal Court of Chicago.

Fee $6.50.

Homer K. Galpin, H. W. M., Clerk.

To Appellate Court.

From the Municipal Court of Chicago.

Gen. No. 201,007.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND WHITE COAL MINING CO.

Transcript of Proceedings.

Homer K. Galpin, Clerk.

Filed Aug. 23, 1912.

J. McCAN DAVIS,
Clerk of Supreme Court.

Filed Appellate Court, Oct. 3, 1910.

ALFRED R. PORTER, *Clerk.*

This record received from Supreme Court of Illinois October 31, 912.

ALFRED R. PORTER, *Clerk.*

1 & 2 *Transcript of Proceedings.*

The Municipal Court.

UNITED STATES OF AMERICA:

STATE OF ILLINOIS,
County of Cook,
City of Chicago, ss:

In the Municipal Court of Chicago.

Pleas, Proceedings and Judgments Before the Municipal Court of Chicago, Held in the City of Chicago, in the County of Cook and State of Illinois, at the Places in the First District in said City Provided by the Corporate Authorities of said City for the Holding of said Court, in the Year of Our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States, the One Hundred and Thirty-fifth.

Present:

Honorable Stephen A. Foster, One of the Judges of the Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.
Attest:

HOMER K. GALPIN, *Clerk.*

Be it Remembered, to-wit: that on the 6th day of August, A. D. 1910, the following among other proceedings were had in said court and entered of record therein, to-wit:

No. 201,007. First Class.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND WHITE COAL MINING CO.

* * * * * * *

3 Be it remembered, that afterwards on the same day, to-wit: on the 18th day of June A. D. 1909, a certain Declaration was filed in the office of the Clerk of the Municipal Court, in words and figures following, to-wit.

4 STATE OF ILLINOIS,
City of Chicago, First District, ss:

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND-WHITE COAL MINING COMPANY.

Chicago & Erie Railroad Company, plaintiff in this suit, by Calhoun, Lyford & Sheean, its attorneys, complains of the Berwind-White Coal Mining Company, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises:

For that whereas, The said defendant, heretofore, to-wit: On the 1st day of January, in the year of our Lord, One Thousand Nine Hundred and Seven, at Chicago, to-wit, at the County aforesaid, became and was indebted to the said plaintiff in the sum of Two Thousand Five Hundred ($2,500) Dollars of lawful money of the United States of America, for divers goods, wares and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to-wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant afterwards, to-wit: On the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant sold and delivered to the said
5 defendant divers other goods, wares and merchandise of the said plaintiff, the said defendant then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of Two Thousand Five Hundred ($2,500) Dollars, of like lawful money as aforesaid, to-wit: at the place aforesaid, whereof the said defendant afterwards on the same day and year, and at the place aforesaid, had notice.

And whereas, also, The said defendant afterwards to-wit: on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of Two Thousand Five Hundred ($2,500) Dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to

the said defendant and at the like request of the said defendant. And in the like sum for other money by the said plaintiff before that time, laid out and expended for the said defendant and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of said plaintiff. And in the like sum for other money before that time due and owing the said plaintiff for interest upon and the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the
6 said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, to-wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, The said defendant afterwards, to-wit: on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of Two Thousand Five Hundred ($2,500) Dollars of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff the said defendant in consideration thereof afterwards, to-wit: on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, The said defendant (although often requested, etc.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of Two Thousand Five Hundred ($2,500) Dollars, and therefore the said plaintiff brings suit, etc.

CALHOUN, LYFORD & SHEEAN,
Plaintiff's Attorneys.

7 *Copy of Amount Sued On.*

Berwind-White Coal Mining Company — Chicago & Erie Railroad Company, Dr.

To goods, wares and merchandise, sold and delivered	$2,500.00
To money paid, laid out and expended	$2,500.00
To money lent and advanced	$2,500.00
To money had and received to be for the use of said Plaintiff	$2,500.00
To money due for interest and forbearance	$2,500.00
To labor, services and material	$2,500.00
To balance due on account stated	$2,500.00
To demurrage as per statement hereto attached	$2,500.00

Plaintiff's Affidavit of Amount Due.

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND-WHITE COAL MINING COMPANY.

STATE OF ILLINOIS,
County of Cook, ss:

E. E. Loomis, being duly sworn, deposes and says that he is the duly authorized agent of the Chicago & Erie Railroad Company, and authorized to make this affidavit in its behalf; that the demand of the plaintiff in the above entitled cause is for demurrage assessed against defendant by said plaintiff in accordance with its published car service rules, because of defendant's neglect and refusal to give disposition orders for, free time allowed under said rules, the certain cars loaded with defendant's coal mentioned in the statement thereto appended and made a part thereof, and that there is due to the plaintiff from the defendant after allowing all just credits, deductions and setoffs, the sum of One Thousand Eight Hundred and Twenty-five ($1,825) Dollars.

E. E. LOOMIS.

Subscribed and sworn to before me this 27th day of May, A. D. 1909.

[SEAL.]

N. H. KENDALL,
Notary Public.

Chicago & Erie Railroad Co.

Berwind-White Coal Mining Company to Chicago and Erie Railroad Company, Dr.,

For Demurrage Charges Due at Chicago.

Cars.		Date rec'd Hammond.	Date notice.	Date orders given.	Date orders rec'd Hammond.	Original consignee.	Am't due.
		1906	1906	1906	1906		
Erie	54746	5-10	5-10	5-21	No date	Berwind-White C. M. Co.	$3.00
N. & W.	42093	5-22	5-22	6-5	6-6	"	5.00
L. S. & M. S.	31710	5-26	5-26	6-11	No date	"	6.00
Erie	42796	5-23	5-23	6-11	No date	"	9.00
N. & W.	55693	5-25	5-25	6-12	No date	"	8.00
Erie	48554	5-22	5-22	6-12	No date	"	11.00
N. & W.	54541	5-23	5-23	6-12	No date	"	10.00
N. & W.	42204	5-25	5-25	6-13	No date	"	9.00
Erie	45374	5-25	5-25	6-13	No date	"	9.00
P. R. R.	167456	6-7	6-7	6-14	No date	"	1.00
N. & W.	8931	6-7	6-8	6-15	No date	"	1.00
N. & W.	11010	6-7	6-7	6-16	No date	"	3.00
N. & W.	52912	6-7	6-7	6-16	No date	"	3.00
N. & W.	11651	5-31	5-31	6-16	No date	"	9.00
C., H. & D.	18655	5-22	5-22	6-18	No date	"	17.00
N. & W.	55168	6-4	6-6	6-19	No date	"	6.00
N. & W.	50868	6-13	6-13	6-20	No date	"	1.00

N. & W.	9095	6-13	6-13	6-20	No date	"	1.00
Erie	45922	6-2	6-2	6-21	No date	"	11.00
N. & W.	54260	6-8	6-9	6-21	No date	"	5.00
Erie	51013	5-31	5-31	6-21	No date	"	13.00
N. & W.	52706	6-6	6-6	6-22	No date	"	9.00
N. & W.	50534	6-4	6-6	6-22	No date	"	9.00
N. & W.	54538	5-31	5-31	6-22	No date	"	14.00
N. & W.	52905	5-31	5-31	6-23	No date	"	15.00
N. & W.	52666	5-31	5-31	6-23	No date	"	15.00
N. & W.	53089	5-31	5-31	6-25	No date	"	16.00
N. & W.	52567	5-31	5-31	6-25	No date	"	16.00
N. & W.	51035	6-2	6-2	6-26	No date	"	15.00
N. & W.	52407	6-2	6-2	6-26	No date	"	15.00
N. & W.	54935	6-2	6-2	6-27	No date	"	16.00
N. & W.	49839	5-28	5-28	6-28	No date	"	21.00
N. & W.	45170	5-30	5-31	6-28	No date	"	19.00
P. W. & C.	51899	5-28	5-28	6-27	No date	"	21.00
N. & W.	9381	5-30	5-31	6-29	No date	"	20.00
N. & W.	49483	5-29	5-29	6-29	No date	"	21.00
N. & W.	54787	5-28	5-28	6-30	No date	"	23.00
N. & W.	11290	6-11	6-11	6-30	No date	"	12.00
N. & W.	50500	6-7	6-7	7-3	No date	"	16.00
N. & W.	55924	6-7	6-7	7-3	No date	"	17.00
N. & W.	53960	6-11	6-11	7-5	No date	"	15.00
N. & W.	52492	6-8	6-9	7-5	No date	"	16.00
N. & W.	11231	6-11	6-11	7-6	No date	"	16.00
N. & W.	9038	6-11	6-11	7-6	No date	"	16.00
N. & W.	8951	6-11	6-11	7-7	No date	"	17.00

Cars.		Date rec'd Hammond.	Date notice.	Date orders given.	Date orders received at Hammond.	Original consignee.	Am't due.
		1906	1906	1906	1906		
	N. & W..... 47366	6-11	6-11	7-7	No date	Berwind-White C. M. Co.	$17.00
9	N. & W..... 8708	6-19	6-19	7-9	"	"	11.00
	N. & W..... 8449	6-19	6-19	7-9	"	"	11.00
N. & W.....	8086	6-18	6-18	7-9	"	"	12.00
N. & W.....	12384	6-20	6-20	7-18	"	"	18.00
N. & W.....	12047	6-20	6-20	7-20	"	"	20.00
N. & W.....	7480	6-20	6-20	7-20	"	"	20.00
N. & W.....	51167	6-16	6-16	7-23	"	"	25.00
N. & W.....	54381	6-19	6-19	7-23	"	"	23.00
N. & W.....	7469	6-16	6-16	7-24	"	"	27.00
N. & W.....	7536	6-18	6-18	7-26	"	"	27.00
N. & W.....	45850	6-23	6-23	7-31	"	"	26.00
A. V.....	378064	6-16	6-16	7-31	"	"	32.00
N. & W.....	41792	6-25	6-25	7-31	"	"	25.00
H. V.....	132	6-19	6-19	7-31	"	"	30.00
N. & W.....	50519	6-16	6-16	8-2	"	"	34.00
N. & W.....	53221	6-22	6-22	8-7	"	"	34.00
N. & W.....	53922	6-21	6-21	8-7	"	"	35.00
N. & W.....	9181	6-18	6-18	8-14	"	"	43.00
N. & W.....	11797	6-16	6-16	8-15	"	"	45.00
N. & W.....	8229	6-20	6-20	8-15	"	"	42.00
N. & W.....	55127	6-21	6-21	8-17	"	"	43.00
N. & W.....	54498	6-24	6-24	8-17	"	"	42.00
P. R. R.....	287136	9-25	9-25	10-4	"	"	3.00
P. R. R.....	280754	9-26	9-26	10-4	"	"	2.00
N. & W.....	49102	9-26	9-26	10-5	"	"	3.00

P. R. R.	340099	9-26	9-26	10-6	" "	4.00
N. & W.	9255	9-26	9-26	10-6	" "	4.00
N. & W.	45303	9-29	9-29	10-10	10-12	3.00
N. & W.	47061	9-29	9-29	10-10	10-11	4.00
N. & W.	9493	9-29	9-29	10-10	No date	4.00
N. & W.	10212	9-29	9-29	10-11	10-12	5.00
N. & W.	46920	10-4	10-4	10-11	10-12	1.00
N. & W.	8534	9-29	9-29	10-11	10-12	5.00
N. & W.	55448	9-26	9-26	10-11	10-12	8.00
N. & W.	47464	9-29	9-29	10-11	10-12	5.00
N. & W.	11557	9-27	9-27	10-12	10-13	8.00
N. & W.	47678	9-29	9-29	10-10	10-11	6.00
N. & W.	9209	9-29	9-29	10-15	10-16	8.00
N. & W.	81335	10-4	10-4	10-15	10-17	4.00
N. & W.	113346	10-4	10-4	10-15	10-16	4.00
N. & W.	111433	9-29	9-29	10-13	10-14	4.00
N. & W.	10264	9-29	9-29	10-15	10-16	5.00
N. & W.	50573	9-26	9-26	10-13	10-14	8.00
N. & W.	8557	10-4	10-4	10-16	10-17	5.00
P. R. R.	110051	10-4	10-4	10-17	10-18	5.00
P. C. C. & St. L.	292711	10-8	10-8	10-19	10-19	6.00
P. Co.	19841	10-8	10-8	10-18	10-19	5.00
E. & P.	2344	10-8	10-8	10-19	10-20	5.00
N. & W.	9665	10-8	10-8	10-22	No date	5.00
P. C. C. & St. L.	8976	10-4	10-4	10-18	"	7.00
H. V.	877151	10-14	10-14	10-22	"	7.00
N. & W.	5864	10-11	10-11	10-23	"	1.00
N. & W.	49700	10-17	10-17	10-24	10-25	5.00
N. & W.	7872	9-22	10-14	10-23	No date	1.00
						21.00

	Cars.		Date received Hammond.	Date notice.	Date orders given.	Date orders received Hammond.	Original consignee.	Am't due.
			1906	1906	1906	1906		
10	P. R. R.	370022	10-14	10-145	10-22	10-23	Berwind-White C. M. Co.	$1.00
	P. R. R.	280775	10-14	10-145	10-24	10-25	"	3.00
	N. & W.	46487	10-17	10-17	10-24	No date	"	1.00
	N. & W.	47477	10-17	10-17	10-25	"	"	2.00
	N. & W.	47199	10-17	10-17	10-25	10-26	"	2.00
	I. C.	76639	10-16	10-16	10-25	10-26	"	3.00
	N. & W.	49676	10-17	10-17	10-25	No date	"	3.00
	N. & W.	10112	10-14	10-14	10-30	10-31	"	8.00
	N. & W.	3468	10-17	10-17	10-30	10-31	"	6.00
	N. & W.	30138	10-24	10-24	10-31	11-1	"	1.00
	N. & W.	30121	10-22	10-22	10-31	11-1	"	3.00
	N. & W.	49714	10-17	10-17	11-1	11-2	"	8.00
	N. & W.	49057	10-18	10-18	11-1	11-2	"	7.00
	N. & W.	30174	10-23	10-23	11-1	11-2	"	3.00
	N. & W.	3800	10-21	10-22	11-2	11-3	"	5.00
	N. & W.	47918	10-19	10-19	11-2	11-3	"	7.00
	N. & W.	45319	10-18	10-188	11-2	11-3	"	8.00
	N. & W.	49548	10-18	10-18	11-2	11-3	"	8.00
	H. V.	25745	10-22	10-22	11-3	11-4	"	6.00
	N. & W.	41472	10-22	10-22	11-5	11-6	"	7.00
	N. & W.	46952	10-19	10-19	11-7	11-8	"	10.00
	N. & W.	47253	10-19	10-19	11-7	11-8	"	10.00
	N. & W.	49430	10-18	10-18	11-5	11-9	"	12.00
	B. C.	2118	10-16	10-16	11-9	11-10	"	15.00
	T. H. & I.	6030	10-14	10-15	11-9	11-10	"	16.00
	N. & W.	41623	10-20	10-20	11-10	11-11	"	12.00

N. & W.	47366	10-19	10-19	11-10	11-11	"	13.00
N. & W.	42069	10-23	10-23	11-12	11-13	"	11.00
N. & W.	47784	10-23	10-23	11-12	11-13	"	11.00
N. & W.	49822	10-23	10-23	11-13	11-14	"	12.00
N. & W.	40949	10-31	10-31	11-13	11-14	"	5.00
N. & W.	40066	10-27	10-27	11-13	11-14	"	8.00
N. & W.	46882	10-23	10-23	11-14	11-15	"	13.00
N. & W.	46183	10-23	10-23	11-14	11-15	"	13.00
N. & W.	45388	10-23	10-23	11-15	11-16	"	14.00
N. & W.	45521	10-24	10-24	11-21	11-21	"	18.00
N. & W.	49716	10-28	10-29	11-23	11-24	"	16.00
N. & W.	47907	10-23	10-29	11-21	11-26	"	[illegible]00
N. & W.	70522	11-2	11-2	11-24	11-25	"	13.00
N. & W.	30157	11-3	11-3	11-24	11-25	"	12.00
N. & W.	46040	10-28	10-29	11-23	11-24	"	16.00
N. & W.	46977	10-31	10-31	11-23	11-24	"	14.00
N. & W.	47341	10-28	10-29	11-27	11-28	"	19.00
N. & W.	47350	10-28	10-29	11-27	11-28	"	19.00
N. & W.	47079	10-28	10-29	11-27	11-28	"	19.00
N. & W.	49219	11-3	11-3	11-28	11-29	"	15.00
C. & O.	12548	11-3	11-3	11-28	11-29	"	15.00
H. V.	3772	11-3	11-3	11-28	11-29	"	15.00
C. & O.	17971	12-7	12-7	12-17	12-18	"	3.00
							$1,825.00

11–13 Be it remembered, that afterwards on the same day to-wit: the 18th day of June A. D. 1909, a certain writ of summons was issued out of the office of the Clerk of said Municipal Court, under the seal thereof, directed to the Bailiff of said Court to execute, which writ, together with the return of the Baliff thereon endorsed, were and are in words and figures following, to-wit:

* * * * * * *

14 Be it remembered, that afterwards, to-wit; on the 3rd day of July, A. D. 1909, a certain Plea of General Issue was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

15–20 STATE OF ILLINOIS,
County of Cook, City of Chicago,
First District, ss:

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD CO.
vs.
BERWIND-WHITE COAL MINING CO.

And the defendant, by Pomeroy & Martin, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it, and of this, it puts itself upon the country, etc.

POMEROY & MARTIN,
Attorneys for Defendant.

[Endorsed:] 201,007. Municipal Court, First District. Chicago & Erie R. R. Co. vs. Berwind-White Coal M. Co. Plea Gen. Issue. Filed Jul- 3—9-46 A. M. 1909. Munn C't of Ch'g'o. —— ——, Clerk. Pomeroy & Martin, Att'ys D'f'd't.

* * * * * * *

21 Be it remembered, that afterwards, to-wit: on the 22nd day of April, A. D. 1910, a certain verdict was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

22 Municipal Court. 467. 5 M. 9-09.

Issues for Plaintiff.

The Municipal Court of Chicago.

Before Judge Foster, Branch 1.

No. 201,007.

CHICAGO & ERIE RAILROAD CO.
vs.
BERWIND WHITE COAL MINING CO.

Contract.

Issues for Plaintiff.

We, the jury, find the issues for the plaintiff, and assess the plaintiff's damages at the sum of Seventeen Hundred Eighty-five Dollars ($1785.00).

JOHN G. BODRUSCHATZ,
Foreman.

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23 Be it remembered, that afterwards, to-wit, on the 6th day of August, A. D. 1910, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to-wit:

Present: Honorable Stephen A. Foster, one of the Judges of the Municipal Court of Chicago; John E. W. Wayman, State's Attorney; Thomas M. Hunter, Bailiff; Homer K. Galpin, Clerk.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND WHITE COAL MINING COMPANY.

Now come the parties to this cause, for hearing on the defendant's motion for a new trial of this cause heretofore entered herein, and the Court being now fully advised in the premises, overrules said motion and a new trial of this cause is denied.

Thereupon the defendant moves the Court in arrest of judgment in this cause, and the Court being now fully advised in the premises, also overrules said motion.

Thereupon this cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the verdict herein and that the plaintiff have and recover of and from the defendant the damages of the plaintiff amounting to the sum of Seventeen Hundred eighty-five dollars ($1785.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor.

Thereupon the defendant prays that an appeal of this cause be granted to the Appellate Court in and for the First District of Illinois, which appeal is granted on condition that said party
24 file herein an appeal bond conditioned according to law in the sum of Twenty-five hundred dollars ($2,500.00) with security to be approved by a judge of this Court within forty days, and that the defendant also have forty days in which to file a bill of exceptions herein.

25 & 26 Be it remembered, that afterwards, to-wit: on the 3rd day of September, A. D. 1910, a certain Appeal Bond was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

* * * * * * *

27 Be it remembered, that afterwards, to-wit: on the 23rd day of August, A. D. 1910, a certain Bill of Exceptions was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

28 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

Before Honorable Stephen A. Foster

No. 201,007.

CHICAGO & ERIE R. R. CO.
vs.
BERWIND-WHITE COAL MINING CO.

APRIL 20, 1910.

	D.	C.	R. D.	R. C.
V. R. White	15			
(Recalled)	34			
A. M. De Weese	47			
(Recalled)	57	58		
"	61			
Ernest J. Mettler	52-70			
Eugene E. Loomis	59			
Joseph N. Stebbins	65			
Charles M. Cook	72	72		

Filed the Municipal Court of Chicago Aug. 23, 1910.
HOMER K. GALPIN, *Clerk.*

29 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND WHITE COAL MINING COMPANY.

Bill of Exceptions.

Be it remembered, that heretofore, to-wit: upon the 20th day of April, A. D. 1910, the above entitled cause came on to be heard, before Honorable Stephen A. Foster, Judge of the Municipal Court of Chicago, First District, and a jury.

Edw. W. Rawlins, Esq., appeared as attorney on behalf of the Plaintiff.

Messrs. Pomery & Martin, appeared as attorneys on behalf of the Defendant.

And thereupon the plaintiff to maintain the issues on its part, introduced the following evidence, to-wit:

Mr. RAWLINS: May it please the court, I first desire to offer in evidence a certified copy by the Secretary of the Interstate Commerce Commission purporting to be a true and correct copy of the Chicago Car Service Association and Storage Rules for the Erie Rail-
30 road Company, I. C. C. No. A 2427, filed with the Interstate Commerce Commission on August 29, 1904. The copy is attached to the certificate. The certificate is signed and sealed by the Secretary of the Interstate Commerce Commission at Washington.

Mr. MARTIN: We object to it, if the Court please, first because I do not know of any statute or rule under which a certificate from the Secretary of the Interstate Commerce Commission is competent evidence. He is not a clerk of any court and under our statute it does not comply with any section that I have been able to discover. In the second place, that even if it were competent that this book attached as an exhibit does not state the rate per day that will be charged. In order to be effective it would have to be referred to in some tariff. It purports to be nothing but a rule, instructions to agents. It does not fix any time when it is to go into effect and it is not printed in compliance with the Interstate Commerce Act as a tariff. Furthermore, if it should be admitted they would be bound to further show that it was distributed and posted according to the terms of the Interstate Commerce Act.

Mr. RAWLINS: Briefly, in reply, section 16 of the act provides that these records that are filed shall be made public records.

The COURT: I will reserve the ruling. I will simply overrule

the objection so far as the certificate goes. I think that under
31 the act of Congress that is made a public document and being a public document that the copy is admissible as far as being a copy.

Mr. RAWLINS: I offer it in evidence and ask it be marked Plaintiff's Exhibit 1.

The COURT: Let it be marked for identification Exhibit 1.

Mr. RAWLINS: I now offer in evidence a certified copy of a letter and rule filed with the Interstate Commerce Commission on October 25, 1905. The certificate is by the secretary of the Interstate Commerce Commission and is under his seal, the certificate being the same as in the document before offered.

Mr. MARTIN: Same objection.

The COURT: It seems to me that that letter attached would have to be excluded, but the other things I make the same ruling as before.

Mr. MARTIN: What is the ruling on this particular one?

The COURT: It may all go in subject to your objection, subject to be stricken out later, or I reserve the ruling until you have made the offer of all the documents and I will pass on them all together.

(Said documents were marked Plaintiff's Exhibit 2.)

Mr. RAWLINS: I now offer in evidence a similar certificate which has attached to it as in the one last mentioned, and accompanying it a rule which refers to the fixing of the demurrage charge.

Mr. MARTIN: Same objection as to the others. That is simply a letter to the Interstate Commerce Commission.

32 (Said documents were marked Plaintiff's Exhibit 3.)

Mr. RAWLINS: I offer in evidence the simple certificate of the Secretary of the Interstate Commerce Commission, certifying as to the going in effect of the tariff A. 3635, cancelling tariff I. C. C. No. A 2427, which is the one which we have offered in evidence.

Mr. MARTIN: That certainly would not be competent, certifying to any fact. It does not certify to any copy, any extract or anything else.

Mr. RAWLINS: The sole and only purpose of it is to show when this tariff that we have offered in evidence went out of existence.

The COURT: I will let this be admitted.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said document was marked Plaintiff's Exhibit 4 for identification.

33 Whereupon an adjournment was taken to Thursday, April 21, 1910, at 9:30 A. M.

34 APRIL 21ST, 1910—9:30 o'clock a. m.

Court met pursuant to adjournment.

Present: Counsel for the respective parties.

Mr. MARTIN: I may as well proceed with my motion as to the admissibility of testimony.

The COURT: Yes.

Mr. MARTIN: That one was not offered.

Mr. RAWLINS: I intended to offer it, when I offered the others.

The COURT: Well, is there any dispute about the admissibility of the certified copies? You raised the point yesterday that there was no Statute? Are you still insisting on that?

Mr. MARTIN: Yes, I insist on that. I haven't any authorities here.

The COURT: I think the Supreme Court has expressly decided the contrary, after looking at the cases last night, and it was raised very early in this State. Did you notice that case in the 17th Illinois?

Mr. MARTIN: No.

The COURT: That related to the land office, of course.

Mr. MARTIN: They are made competent by statute.

The COURT: That is the 17th Illinois, 95. That case is
35 commented on with approval in the 53rd Illinois, 120. In both of those cases certified copies of records in the general land office were admitted, although it was objected that there was neither a State nor a Federal statute that made them admissible, and the Supreme Court held that under the general laws, certified copies of that sort were admissible, without regard to the special law of the State.

Mr. MARTIN: The decision of Judge Windes as to Section 882 is to the same effect.

The COURT: I think it disposes of that point.

Mr. MARTIN: Now, that we have gotten up to that proposition we will raise all the points, and have them all passed on together. Have you offered these in evidence?

Mr. RAWLINS: Yes.

Mr. MARTIN: As to all of the exhibits I want to raise the objection just referred to by the Court, that a certificate of the Secretary of the Interstate Commerce Commission does not make the evidence competent, and that it is absolutely irrelevant, and immaterial for any purpose, and not properly proven, and that I take it, the court has already passed on, and I note exceptions to the ruling.

The COURT: There is no dispute that the Secretary is the keeper of the records, is there? He is the official of the Interstate Commerce Commission.

Mr. MARTIN: The law so provides.

36 Mr. RAWLINS: The Statute provides he is the one to do the certifying.

Mr. MARTIN: He is the keeper of the seal, and when anything is filed——

The COURT: He is the proper official, if anybody is. I think so far as that goes the evidence is competent.

Mr. MARTIN: Exception. Now, then as to Exhibit 1, I want to object to it first, because it does not state the rate; it does not say anything about how much they are to charge per day, or any other time; there is no amount in dollars and cents, or any other figures mentioned. Then in the second place, in order to make it operative, it must have been referred to in the tariff under which the shipment

was made from the point of origin; in the third place it does not fix the time when it is to go into effect; In the Fourth place, it is not printed according to the Interstate Commerce law, and there is no showing, as yet, that it has been filed, or that it has been distributed or posted, or kept open for public inspection. Then it does not purport to be a tariff at all. Moreover it has not been shown yet except by counsel's opening statement, which I take it he intends to establish, just where this shipment was made to. Now, that is to the first.

As to Exhibit 2, this is all one Exhibit, I take it, Mr. Rawlins, attached? Those are not separate?

Mr. RAWLINS: No.

37 Mr. MARTIN: It is merely a letter to the Interstate Commerce Commission, and could not, in any sense, I take it, be construed as a tariff; it is not anything that the public could well have inspected, and nothing that would have been likely to have been distributed, would not have been a compliance with the law if it had been properly distributed, because the statute provides that they must be printed in large type, and distributed to the different stations.

Mr. RAWLINS: Mr. Martin, pardon me for interrupting. I think you are in error. No statute provides for any distribution at any station. If it does, I cannot find it in it, any way.

Mr. MARTIN: Yes, look at the statute. One of the acts did.

Mr. RAWLINS: This is under two acts.

Mr. MARTIN: These shipments cover both acts. This new act went into effect August 29th, 1906.

The COURT: That is the Hepburn Act.

Mr. MARTIN: That is the Hepburn Act. The Hepburn Act was in force while the last part of these shipments was made. This is the act, as it is at present, that I am reading first.

(Counsel here read from the act referred to.)

Mr. RAWLINS: Under what section is the old one?

Mr. MARTIN: They are both sections 6. It reads first the section I gave, and then it reads, "the section was originally as

38 follows:

(Counsel continued reading.)

Now, to continue with my objection. I will ask the reporter to read as far as I had gone with it.

(Previous portion of objection read.)

Mr. MARTIN (continuing): And it does not refer to the tariff under which the shipment was made, nor does the tariff under which the shipment was made refer to it. Then it is not printed according to law, in large type, and in the form of a tariff.

The COURT: Do both the old section 6 and the new, do they both provide for printing in large type?

Mr. MARTIN: Yes, the language, as I remember it, is exactly the same in that respect, and the second sheet attached to the exhibit is objectionable for all of the same reasons urged to the first, except that it is merely a notice, and does not purport to be the tariff, and does not appear to have been sent to the Interstate Commerce Commission at all, so far as it shows on its face.

Mr. RAWLINS: They certify that they have it.

Mr. MARTIN: They certify that they have it; but on its face it does not purport to have been filed.

As to Exhibit 3, the first—well, all of the sheets of that appear to be ordinary copies of letters mailed to J. M. Smith, auditor of the Interstate Commerce Commission and do not purport to be
39 tariffs; they do not comply with the law as to tariffs; they do not refer to the tariff under which this shipment was made, nor is there any showing that the tariff under which the shipment was made refers to it. It is not printed, and does not comply with the Interstate Commerce Act.

As to Exhibit 4, it purports merely to be a statement of certain facts, not a certificate of something that is on file there, or any portion of a thing that is on file there, but it simply says, "I hereby certify to the Chicago Car Service Association that the attached rules and instructions, Erie Railroad, I. C. No. A-3635 and R-3658, was filed with the Interstate Commerce Commission on July 20th, 1907, as effective February 20, 1907, cancelling Erie I. C. No. A-2427." In the first place that is not a competent way of proving anything. You could not have a clerk of a Court, which is certainly as solemn a matter as this, certify that certain things had been done in his court; he may certify copies of records.

The COURT: That is the general rule; it has been held many times that an officer cannot certify to the effect of a document that is filed, and the action taken. I only previously let that in on the theory of their having proved a certain rate existed it would be presumed to continue to be in force until it was shown it was canceled, so it was really something he did not have to prove anyway. If I
40 thought this case in any sense depended on that, I think, myself, it would be bad, and perhaps it should not be admitted. There has been some relation in the rule, but only by statute, I think. Of course, Professor Wigmore thinks the rule should be very much relaxed, as he shows it is often extremely difficult for you to prove a case, unless you permit an officer to do something—permit an officer to certify to the effect of a certain document; but I don't think the cases have gone very far in that line. I doubt if that last exhibit is admissible, if it is at all important.

Mr. MARTIN: Now then, as to the law on the proposition, is there any question but what the Interstate Commerce Commission had jurisdiction of demurrage? Do you want any authorities on that proposition?

Mr. RAWLINS: There is some considerable question about it.

Mr. MARTIN: Well, the federal Court has so held, I understand, in the case of Wishe v. New York, New Haven & Hartford Railroad.

Mr. RAWLINS: Of course, I will say it is on the belief that the Court will hold that they do, we are offering all these records.

Mr. MARTIN: That is in the 157th Fed. Rep. 694. The question was raised there as to whether or not the Interstate Commerce Commission had jurisdiction over demurrage. * * *

The COURT: Well, your contention is that the Interstate
41 Commerce Commission has jurisdiction.

Mr. MARTIN: Oh, yes.

Mr. RAWLINS: We are not conceding that.

Mr. MARTIN: We are going on that theory.

The COURT: You contend it did.

Mr. MARTIN: Now then, that the rate must be shown on t tariff, I read from the case of Suffern Hunt & Co. v. I. B. & W. the 7th Interstate Commerce Rep. p. 272.

(Counsel here read from case cited.)

Counsel proceeded to argue the objections to the introduction the documents.

* * * * * * *

42 The COURT: I hardly think I would be justified in holdi them inadmissible in evidence.

Mr. MARTIN: Note an exception to the ruling of the Court.

The COURT: I will admit them.

Mr. MARTIN: Exception.

To which ruling of the Court the defendant, by its counsel, the and there duly excepted.

Mr. RAWLINS: I renew my offer of these documents, and I as that they be marked as Plaintiff's Exhibits 1, 2, 3 and 4, and r ceived in evidence.

The COURT: Let them be admitted.

Mr. MARTIN: Objection by defendant; objected to on the groun heretofore stated.

The COURT: Objection overruled, and the documents admitted

Mr. MARTIN: Exception by defendant.

Said documents, offered and admitted in evidence in behalf the plaintiff were marked as Plaintiff's Exhibit- 1, 2, 3, and 4, r spectively, and are in the words and figures as follows, to wit:

43 PLAINTIFF'S EX. 1, F. H. S.

Interstate Commerce Commission.
Office of the Secretary.
Washington.

Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerc Commission, do hereby certify that the pamphlet hereto attached i a true and correct copy of The Chicago Car Service Association Ca Service and Storage Rules, Erie R. R. I. C. C. No. A02427, filed wit the said Interstate Commerce Commission on August 29, 1904.

In witness whereof I have hereunto set my hand and affixed th Seal of said Commission this 4th day of April, A. D. 1910.

[Seal Interstate Commerce Commission, 1887.]

E. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

44 The Chicago Car Service Association.

Car Service and Storage Rules.

September 1st, 1904.

(Amended.)

Office: 705 Western Union Building, Chicago.

44*a* The Chicago Car Service Association.

Car Service and Storage Rules.

September 1st, 1904.

(Amended.)

Office: 705 Western Union Building, Chicago.

44*b* *Territory.*

All points within the area bounded by Lake Michigan on the east; Waukegan, Illinois, on the north; thence following and including the line of the Elgin, Joliet and Eastern Railway to and including Griffith, Indiana; thence north to Edgemoor, Indiana, on Lake Michigan.

44*c* The Chicago Car Service Association.

C. W. Sanford, Manager.

Members.

The Atchison, Topeka & Santa Fe Railway Co.
Baltimore & Ohio Railroad Company.
Chicago & Alton Railway Company.
Chicago & Erie Railroad Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & North-Western Railway Company.
Chicago & Western Indiana Railroad, and the Belt Railway of Chicago.
Chicago, Burlington & Quincy Railway Co.
Chicago Great Western Railway Company.
Chicago, Indianapolis & Louisville Ry. Co.
Chicago Junction Railway Company.
Chicago, Lake Shore & Eastern Railway Co.
Chicago, Milwaukee & St. Paul Railway Co.
Chicago, Rock Island & Pacific Railway Co.
Chicago Terminal Transfer Railroad Company.

Elgin, Joliet & Eastern Railway Company.
Grand Trunk Railway System.
Illinois Central Railroad Company.
Indiana Harbor Railroad Company.
Lake Shore & Michigan Southern R'y Co.
Michigan Central Railroad Company.
New York, Chicago & St. Louis Railroad Co.
Pere Marquette Railroad Company.
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company.
Pittsburg, Ft. Wayne & Chicago R'y Co.
Wabash Railroad Company.
Wisconsin Central Railway Company.
Illinois Southern Railway Company.
Chicago, Indiana & Southern Railroad Company.

44*d* *Rules and Instructions to Agents.*

September 1, 1904.

Amended.

RULE 1.

Freight in carloads is subject to the following car service rules and freight held in railroad warehouses or on platforms is subject to the following storage rules:

RULE 2.

Free Time.

(A) Forty-eight hours will be allowed for the loading or unloading of cars.

(B) When the same car is reloaded, ninety-six hours will be allowed for unloading and reloading.

(C) Forty-eight hours will be allowed on storage tracks of railroads bringing cars into territory of the Association for the placing of reconsignment or switching orders, but this will not apply when cars are moved from one delivery track to another for accommodation of consignees.

44*e* RULE 3.

Computing Time.

(A) Time will be computed from the first 7 A. M. after notice of arrival, when cars are held for orders, and from first 7 A. M. after notice of placing on public delivery track when cars are held for unloading, except as hereinafter provided.

For cars delivered on private tracks, time will be computed from the first 7 A. M. after cars have been placed.

(B) In all cases covered by these rules notice of arrival of cars held for orders and of cars placed on public delivery tracks shall be served personally or by deposit in the United States Post Office, or by any other means established by custom or mutaally agreed upon between agents and consignees. If given by mail, the notice shall date from time of deposit in the Post Office.

The placing of a car upon a private track shall be construed as notice of delivery.

Rule 4.

Holidays.

In computing time, Sundays and the following holidays are excluded: New Year's Day, Lincoln's Birthday, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and all general and municipal election days. When a legal holiday falls on Sunday, the following Monday will be excluded.

Rule 5.

Grain.

(A) Cars containing grain in bulk will be allowed forty-eight hours free time for disposition from 12 o'clock noon of the day of arrival, provided the grain is subject to inspection at Chicago, and is inspected before 10 o'clock A. M. of that day. If inspection is made after 10 A. M., car service will begin forty-eight hours from 12 o'clock noon of the following day.

44*f*

(B) Grain ordered to elevators located on tracks of the railroads bringing the cars into the territory of this Association will be held five days free of car service from first 7 A. M. after orders are filed with local agent.

(C) Grain from connecting lines consigned or ordered to elevators will be held five days free of car service from first 7 A. M. after receipt by the railroad delivering to elevator.

(D) Grain from connecting lines held for disposition will be allowed forty-eight hours free time from first 7 A. M. after receipt of cars by secondary line for the placing of final billing directions with billing agent.

(E) Cars for loading at elevators will be allowed forty-eight hours free time for the placing of billing directions with billing agent, from the first 7 A. M. after such cars are switched to elevators or tendered to the same for loading.

Rule 6.

Baled Hay and Straw.

Cars loaded with baled hay and straw, will be allowed forty-eight hours free time from first 7 A. M. after being placed on track in de-

livery yard, for the placing of orders. Forty-eight hours additiona free time will be allowed for unloading, computing time from firs 7 A. M. after order is filed at local office.

44*g*

RULE 7.

Coal and Coke.

(Amended November 15, 1905.)

Cars loaded with coal and coke may be held on storage tracks o the railroads bringing cars into the territory of the Association for a period of five (5) days free time for disposition.

RULE 8.

Freight in Bond.

Freight in bond will be allowed forty-eight hours free time for removal from the first 7 A. M. after permit to receive goods is issued to consignee by United States Collector of Customs.

RULE 9.

Cars Held for Various Causes.

(A) Cars containing freight held for billing, milling, shelling, cleaning, sacking, or for change of load by owner or his agent, will be subject to car service charges if held in excess of forty-eight hours, and if such freight is transferred to other cars, the charge will continue on cars to which transfer is made, and must be collected or billed as advances.

(B) Cars billed to order, when held for bills of lading or instructions, are subject to car service charges at the expiration of forty-eight hours from notice of arrival, and car service charges must be collected before delivery of the freight.

RULE 10.

Cars Withheld from Delivery.

(A) When cars are held for payment of freight charges, car service charges will be assessed at the expiration of forty-eight hours from notice of arrival.

44*h* (B) When cars are held by reason of consignee not being ready to receive them, the agent shall include such cars in his report to the Manager, and car service charges shall accrue thereon as provided in the rules.

RULE 11.

Inability to Receive Freight.

When any consignee is unable to receive freight or to unload cars, and, for that reason, the delivering line refuses to receive cars from connecting lines consigned to such consignee, the agent of such connecting line or lines holding cars for such consignee shall immediately notify either the consignor or consignee of the cars so held, and of the inability to forward or deliver the same, and shall charge car service, if delivery cannot be effected within the time allowed for reconsignment.

RULE 12.

Car Service Charges.

(A) At the expiration of free time, each member will collect car service charges according to its schedule of rates for all unreasonable detention of cars held for loading or unloading or subject to orders of consignors, consignees, or their agents.

(B) When both cars and tracks on which cars are held, are owned by the same party—not a railroad company—no charge will be made, but when private cars are detained on tracks belonging to or operated by a member of this Association, the car service charges fixed by such company shall apply.

44*i*

RULE 13.

Storage.

(A) Storage will be charged by each member when freight unloaded at railroad warehouses or platforms is not removed by consignee within forty-eight hours from the first 7 A. M. after notice.

(B) Freight in cars placed on delivery tracks and subsequently sent to railroad warehouses or platforms, is subject to car service rules while on delivery tracks, and to storage rules after cars are unloaded at warehouses or platforms.

(C) Freight upon which the free time has expired while on delivery track, and which is subsequently sent to warehouses or platforms, shall be subject to storage charges immediately when unloaded at warehouses or platforms.

(D) Freight received for shipment at railroad warehouses or platforms will be charged storage, if held more than forty-eight hours from first 7 A. M. after receipt, to complete a shipment or for forwarding directions.

RULE 14.

Storage Charges.

When freight is held in railroad warehouses or on platforms in excess of free time, a reasonable charge per ton will be made for storage.

Any fractional part of 2,000 pounds will be computed as a ton and any fractional part of twenty-four hours will be computed as a day.

44*j*

RULE 15.

Deliveries.

(A) Cars containing freight to be delivered from track, warehouses or platforms, shall be switched to points of delivery as soon as practicable after arrival.

(B) The delivery of cars consigned, or ordered, to private tracks or designated public delivery tracks, shall be considered to have been effected when such cars have been placed on the tracks designated, or, if such tracks be full, when the road tenders the cars by giving notice of their arrival.

RULE 16.

Weather.

Agents will collect car service charges regardless of the state of the weather, unless exemption is authorized by the Manager.

RULE 17.

Reports.

Agents of members of this Association shall make and send to the Manager a record of all freight subject to car service and storage rules, on such forms and in such manner as may from time to time be prescribed, and give such other information in relation to car service and storage as may be required by the Manager.

44*k*

RULE 18.

Exceptions.

Live stock and company material shall be exempt from car service rules, and shall not be included in reports to the Manager.

RULE 19.

Collections.

(A) Car service and storage charges shall be collected in the same manner and with the same regularity and promptness as transportation or switching charges.

(B) Freight upon which car service or storage charges have accrued shall not be removed from the railroad company's premises until the charges thereon have been paid. When consignors or consignees refuse to pay, agent will hold freight until payment is

made and assess regular charges until the freight is removed; or, at his option, may send freight to public warehouse or yard, where the same will be held subject to storage charges, in addition to all other charges.

(C) When cars are detained on private tracks beyond the free time for loading or unloading, and payment of car service charges is refused, the agent of the railroad company delivering such cars will, after giving five days' notice, decline to switch cars to private tracks of such parties, and will thereafter tender freight from public team tracks, and collect freight charges before delivery, until satisfactory guaranty is given that car service rules will be complied with; the Manager of the Association is to be promptly advised of such action.

44/ (D) When grain is held for an elevator in excess of free time, car service charges will be collected from the elevator.

(Amended February 14, 1906.)

(E) Car service and storage charges that accrue while cars are held for loading, or shipments for billing instructions, or re-consignment, will be collected by agent of the forwarding line, when such shipments are ordered to points on connecting lines within the switching limits of this Association. When car service and storage charges accrue on shipments ordered or destined to points beyond switching limits, such charges must be collected by the agent of the forwarding line or entered on shipping tickets, bills of lading and waybills as advances before freight is forwarded.

Rule 20.

Claims.

All claims for relief from or refund of charges accruing under these rules shall be adjusted by the individual members, but only after examination by the Manager and a written recommendation from him concerning each claim.

45 Plaintiff's Ex. 2. E. H. S.

Interstate Commerce Commission.
Office of the Secretary.
Washington.

Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true and correct copies of letter, and notice enclosed therewith, received and filed with the said Interstate Commerce Commission on October 25, 1905.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of April, A. D. 1910.

[Seal Interstate Commerce Commission, 1887.]

E. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

46 Erie Railroad Company,

General Freight Agent's Office, Railway Exchange.

Erie Lines West of Buffalo & Salamanca.

In your reply please refer to File Cog. R-5435. I. C. C. A-2427.

CHICAGO, ILL., *October* 23, 1905.

J. M. Smith, Auditor Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Enclosed find copy of Notice of The Chicago Car Service Association, changing Rule 7 of that Association, effective Nov. 15, 1905.

Yours truly,

C. L. THOMAS,
Gen. Fr't Ag't, Whittlesey.

#5.

47 & 48 The Chicago Car Service Association.

Notice.

CHICAGO, ILL., *October 18th*, 1905.

To Whom it May Concern:

Rule 7 of the rules of The Chicago Car Service Association reads as follows:

Coal and Coke.

"Cars loaded with coal and coke may be held on storage tracks of the railroads bringing cars into the territory of the Association for a period of seven (7) days free time for disposition."

This rule has been amended by the members of the Chicago Car Service Association to read as follows:

Coal and Coke.

"Cars loaded with coal and coke may be held on storage tracks of the railroads bringing cars into the territory of the Association for a period of five (5) days free time for disposition."

Effective November 15th, 1905.

Applies to cars loaded with coal and coke in storage yards 7 a. m. November 15th, 1905, and to cars loaded with such freight that arrive subsequent to such date.

C. W. SANFORD, *Manager.*

49 PLAINTIFF'S EX. 3. F. H. S.

Interstate Commerce Commission.
Office of the Secretary.
Washington.

Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true and correct copies of letters on file with the said Interstate Commerce Commission, received on dates specified below, to wit:

Letter dated August 26, 1904, received August 29 1904;
Letter dated August 30, 1904, received September 1, 1904;
Letter dated September 12, 1906, received Sept. 15, 1906;
Letter dated October 25, 1906, received October 27, 1906;

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of April, A. D. 1910.

[Seal Interstate Commerce Commission, 1887.]

E. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

50 Erie Railroad Company,

General Freight Agent's Office, Railway Exchange.

Erie Lines West of Buffalo & Salamanca.

In your reply please refer to File Dot. R-5435. I. C. C. A-2427.

CHICAGO, ILL., *Aug. 26th*, 1904.

Mr. J. M. Smith, Auditor Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I enclose herewith, a copy of The Chicago Car Service Association, Car Service and Storage Rules effective Sept. 1st, 1904, which cancels the rules previously filed, as per our letter of May 19th, 1904.

Yours truly,

C. L. THOMAS,
General Freight Agent.

Enc. #6.

51 Erie Railroad Company,

General Freight Agent's Office, Railway Exchange.

Erie Lines West of Buffalo & Salamanca.

In reply please refer to File Dot. R-#5345. *L. C. C. A-2427.*

CHICAGO, ILL., *August 30th,* 1904.

Mr. J. M. Smith, Auditor Interstate Commerce Com., Washington, D. C.

DEAR SIR: Referring to our letter of the 26th inst. under above numbers, enclosing copy of The Chicago Car Service Association car service and storage rules, effective September 1st, 1904.

In connection therewith, beg to advise that our rates will be—

Car Service. One Dollar ($1.00) per car per day, or fraction thereof.

Storage. Five cents (5¢) per ton per day, or fraction thereof.

Effective September 1st, 1904.

Yours truly,

C. L. THOMAS.
General Freight Agent. Whittlesey.

52 Erie Railroad Company,

General Freight Agent's Office, Railway Exchange.

Erie Lines West of Buffalo & Salamanca.

In your reply please refer to File Dot. R-5435 I. C. C. No. A-2427.

CHICAGO, ILL., *September 12th,* 1906.

Mr. J. M. Smith, Aud. Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I enclose herewith a copy of the rules of the Chicago Car Service Ass'n, same covering car service and storage rules in effect at Chicago, same being effective September 1st, 1904. Also Chicago Car Service Ass'n Circulars Nos. 1, 2, 3, 4, 5, 6 and 7 together with supplement to the rules issued September 3rd, 1906.

Will you please acknowledge receipt.

Yours truly,

C. W. CLARKE,
General Freight Agent.
W. M. N.

53 & 54 Erie Railroad Company.

Chicago & Erie R. R. Co.

New York, Susquehanna & Western R. R. Co.

New Jersey & New York R. R. Co.

Dot. R-5435.

CHICAGO, *October 25th*, 1906.

Mr. J. M. Smith, Aud. Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Herewith correction on Supplement of September 3rd, 1906, to Chicago Car Service Ass'n Rules effective September 1st, 1904, copies of which were transmitted to you with our letter of September 12th, 1906, receipt of which was acknowledged by you on September 18th, 1906, file 19-56.

These rules are filed under I. C. C. No. A-2427. Will you please acknowledge receipt of the enclosed and oblige?

Yours truly,

C. W. CLARKE,
General Freight Agent.
W. M. N.

W. M. N./G.

55 & 56 PLAINTIFF'S EX. 4. F. H. S.

Interstate Commerce Commission.
Office of the Secretary.
Washington.

Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the Chicago Car Service Association Car Service and Storage Rules and Instructions, Erie R. R. Co. I. C. C. No. A-3635 (R-8658), *was* filed with the said Interstate Commerce Commission on January 21, 1907, reading as effective February 20, 1907, cancelling Erie R. R. Co. I. C. C. No. A-2427.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 4th day of April, A. D. 1910.

[Seal Interstate Commerce Commission, 1887.]

E. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

57 Mr. RAWLINS: Mr. Martin, have you the arrival notices covering the cars in the bill of particulars?

A. I don't know; I have a bunch here. Whether they cover them or not, I do not know. I will let you sort them out. (Producing papers.)

Mr. RAWLINGS: About the only logical way we can proceed with the witness. We have one. I think he is the next one in order. I think he will be in in a moment.

Mr. MARTIN: If the Court please, we have agreed to stipulate into the record that the cars involved in this case, all of them, were shipped from Berwind, West Virginia, to Chicago, Illinois, and that the freight was paid from Berwind, West Virginia, to Chicago, Illinois.

Mr. RAWLINS: May I make this suggestion: From Berwind, West Virginia, to Berwind-White Coal Mining Company, Chicago, Illinois.

Mr. MARTIN: All right.

Mr. RAWLINS: To Berwind-White Coal Mining Company.

Mr. *Rawlins:* To the defendant in this case.

Mr. RAWLINS: Yes. And that the freight was paid.

V. R. WHITE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

58 Q. Please state your name?

A. V. R. White.

Q. What is your occupation?

A. I had charge of the accounts of the Berwind-White Coal Mining Company.

Q. What was your occupation during the summer and fall of the year 1906?

A. The same.

Q. Had you been employed by that company prior to that time.

A. Since April 1st, 1906.

Q. Since April 1st, 1906. Now, again, what were your duties there?

A. I had charge of the accounts.

Q. I will ask you whether or not as a part of your work there you received the arrival notices of cars of coal that were shipped to Berwind-White Coal Mining Company here in Chicago?

A. Either I or somebody else took them.

Q. I will ask you to look at these notices which I now hand you, and ask you to state, Mr. White, whether or not those notices were received by the Berwind-White Coal Mining Company.

A. Each one separate?

Q. No, take them all now. Those are the ones we have glanced over.

A. Those are the ones that we have been checking?

Q. Yes, those are the ones that we have been checking?

A. Yes, they were received.

Q. I will ask you to look at the back of them just now, and on the back you will find a stamp. By whom was that stamp attached, and when, with reference to the receipt of the notice?

59 A. By someone in the office.

Q. Someone in the office. Now, Mr. White, I will ask you to read slowly the number of the car, and the date on the back, then, on each one of the bills.

Mr. MARTIN: Are you introducing them in evidence now?

Mr. RAWLINS: Yes.

Mr. MARTIN: Well, I want to object to that if the Court please. Those notices show the time of arrival at Hammond, Indiana; not at Chicago. They do not show that they have ever gotten to Chicago yet.

Mr. RAWLINS: Well, if the Court please, with reference to that we will follow this witness with proof to show that the storage yards of the Erie Railroad Company, for Chicago, where all cars of coal of this character were stored and always have been and still are, — at Hammond. That was the storage yard of the Company for this particular point.

Mr. MARTIN: Yes, but your tariff- that you have introduced do not cover that kind of demurrage.

The COURT: Well, what does the car service say?

Mr. MARTIN: It does not say anything about that kind of demurrage.

Mr. RAWLINS: It gives the territory within which that charge is made, extending down to Griffith, Indiana. We will show that all of these cars practically, ultimately, went to different places
60 around Chicago, Illinois, and were finally delivered where they wanted them.

The COURT: I think it would be competent, with the proof that you say you will offer.

Mr. MARTIN: I did not hear the Court's ruling.

The COURT: I think that is competent, in the way he limits his offer.

Mr. MARTIN: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. RAWLINS: Go ahead.

A. You want the initial and car number?

Q. No, just the car number—You might give the initial, too.

A. 54746.

Q. Now, the date on the back.

A. 5/10/06.

The COURT: What does the 5/10/06, mean?

Mr. RAWLINS: May 10, 1906; the date the arrival notice was delivered, which is September on that.

The COURT: Well, he did not so testify—that's all. You ask him.

Mr. RAWLINS: I asked him with reference to the time of the notice, when was the stamp put on.

The COURT: Yes, but he did not answer it. He did not answer your question.

Mr. RAWLINS: Oh, pardon me.

61 The COURT: He said the stamp was put on the back in their office.

Mr. RAWLINS:

Q. When, with reference to the receipt of that notice was the stamp put on?

A. May 10, 1906.

Q. I know; but when, with reference to the time you received that—on the same day or some other day, with reference to the notice?

A. Just as soon as the notices were brought into the office.

Q. All right; the next; Read them right along.

A. 42093.

Mr. MARTIN: In order to keep the record straight, I desire to enter that same objection to each of these receipts, to save repeating it in the record each time.

Mr. RAWLINS: Yes, let the record so show.

The COURT: Well, objection overruled.

Mr. MARTIN: Exception.

Mr. RAWLINS: All right, Mr. White.

A. 31710.

(NOTE.—Court and Counsel each checking from bill of particulars filed.)

Mr. RAWLINS: We didn't get the second one; that was 42093.

Mr. MARTIN: What are you doing, just getting the date received?

Mr. RAWLINS: No, I am getting the number of the cars, and the date received.

Mr. MARTIN: And not the date of the other——

62 Mr. RAWLINS: No.

Mr. MARTIN: 42093 is the next one, is it?

Mr. RAWLINS: I want the second one.

The COURT: He did not give the date.

A. Mry 22, 1906—31710, May 26; 42796, the 23rd of May; 55693, May 25; 48554, the 22nd of May; 54,541, the 23rd of May; 42202——

Mr. RAWLINS: Right at that point, if I may say, there is an error in that number, and I would like to amend the bill of particulars on its face, changing that from 4220 to 4222.

The COURT: That is different from the number he gave. He gave 42200, didn't he?

The WITNESS: Yes.

Mr. RAWLINS: Change the number to 42202 on its face.

The COURT: It is 42204. He wants to change the 4 to a 2.

Mr. RAWLINS: Yes, it is marked out on mine.

The COURT: Leave to change or amend, granted.

Mr. RAWLINS: Go on.

A. —May 25th: 45374; May 25th: 16745, June 7th; 8931—June 8th.

Mr. MARTIN: June 8th, you say; it is the 7th here.

Mr. RAWLINS: Well, the date in this, you will see, is on the second column.

A. June 8th is the date received.

The COURT: He is giving the second column.

62½ Mr. MARTIN: Oh, it is the second column here.

Mr. RAWLINS: Yes, they are all the same, except down to that one, you will find it all right.

A. 11010 that *if* June 7th; 52912—June 7th; 11651—May 31; 18655—May 22; 50868, I think——

Mr. MARTIN: He is skipping one, there.

Mr. RAWLINS: Well, there is one apparently they have got——

Mr. MARTIN: Eliminate that one.

Mr. RAWLINS: We can make proof of that, that the receipt—make proof of that arrival notice later on.

Mr. MARTIN: Is the '68 the next?

A. 50868—June 13th; 9095—June 13th; 45922—June 2nd; 54260—June 9th; 51013—May 31; 52706—June 6; 54538—May 31.

Mr. MARTIN: He is jumping another one.

Mr. RAWLINS: Yes.

Mr. MARTIN: How about that?

The COURT: There are two omitted.

Mr. RAWLINS: Yes.

Mr. MARTIN: '38 is the next one.

Mr. RAWLINS: Yes.

Mr. MARTIN: Five thirty one—did you say May 31st?

A. 54538 was the last one on May 31st.

Mr. MARTIN: All right.

Mr. RAWLINS: Yess, proceed.

63 A. 52905 is the next on May 31st; 52666 May 31; 53089—May 31st; 52567—May 31st; 51035—June 2d; 52407—June 2nd; 54935—June 2nd; 49839—May 28th; 45170—May 31; 51899—May 28th; 9381—May 31; 49483—May 28th; 54787—May 28th; 11290—on June 11th; 50500—on June 7th; 55924—June 7th; 53900—June 11; 52492—June 9th; 11231—June 11; 9638—that is on the same date; 8951—June 11; 47366—same date; 8708—June 19th; 8449—same date; 8086—June 18th; 12384—June 20th; 12047—same date; 7480—same date; 51167, June 16th; 54381—June 9th; 7469 on June 16th; 7536—on June 18th; 45850—on June 23rd; 378064, June 11th; 41792; June 25; 132—June 19th; 50519.—June 16th; 53922—on June 21; 53221—June 22; 9181—on June 18th, 11797—June 16th; 8229—on June 20th; 55127—on June 21; 54498—on June 2nd;

The COURT: June 22nd?

A. June 22nd.

Mr. MARTIN: It should have been 24th; it is June 24th here.

Mr. RAWLINS: Well, then, we have lost $2.

A. 287136——

Mr. RAWLINS: Just — moment, until I get that changed. That was car number 54498—where it is 24 it should be—your number is 22?

64 A. 22.

Mr. RAWLINS: Well, I don't care for that All right.

A. It may have been caused by a stamp not being changed on a Monday morning. 287136—September 25; 280754—September 26th; 49102—on September 26th.

Mr. RAWLINS: Just a moment. I am getting lost here. You are so swift.

A. 34009—on September 26th; 9255—September 26th; 45303—September 29; 47051—same date; 9493—same date; 10212—same date; 46920—October 4; 8534—September 29th; 55448—September 26th; 47464—September 29th; 47678—September 29th; 9209—September 29th; There seems to be two notices on that car. One is recepited for on October 6th; and the other September 29th.

Mr. RAWLINS: That is 8135?

A. 9209—that is.

Q. And which is the first date?

A. September 29th; 8135 on October 4; 11346—October 4; 11163—September 29; 10264—same date; 50573—September 26th; 8657—October 4th; 11061—the same; 292711—October 8th; 19841—the same; 2344—the same; 966—the same; 8976—on October 4th; 877151—October 15; 5864——

Mr. RAWLINS: Just a moment. Is the date there the 14th?

A. The 15th.

Mr. RAWLINS: That seems to be marked wrong. Mark

65 that with a question mark there.

A. 5864—October 11; 49700—October 17; 7872—October 15th; 370022—October 15th.

Mr. RAWLINS: Wait a moment.

A. 280775—October 15th.

Mr. RAWLINS: Just a moment. All of those seem to be three there—they are all right.

A. 47477—on October 17; 47179 or 199—on October 17th; 76639—October 16th; 49676—on October 17th; 101122—October 15th; 3468—October 17; 30128—October 24th; 30121—October 22; 49714—October 17th; 30174—October 23; 3800—October 22; 47918—October 19; 45319—October 16; 43548—the same; 29745—October 22; It may be the 27th, the 23745—October 22——

The COURT: You have got it here "7".

Mr. RAWLINS: Well, it is pretty hard always to get every figure. It might be either 7 or 9, according to this.

A. Yes, either the 7th or 9th.

Mr. RAWLINS: Well, unless there is some objection to it—I don't want to prove up a car that the number is not right on. According to the re-consigning orders, it should be in the nines.

Mr. MARTIN: What does the bill say about it?
Mr. RAWLINS: The bill is drawn—it may be either.
Mr. MARTIN: No objection.

66 Mr. RAWLINS: All right; let it stand as it is. All right. Mr. White.

A. Under that date, October 22,—41472—October 22nd, 46952—October 19th; 47253—October 19th; 49430—October 18th; 2118—October 10th; 6030—October 15th; 41623—October 20; 47366—October 19th; 42069—October 23; 47784—October 23; 49822—October 23; 40947—October 31; 40006—October 27th; 46882—October 23; 46183—October 23; 45388—October 23; 45552—October 24; 49716—October 29; 47907—October 29; 70522—on November 22; 30157—on November 3; 46040—on October 29; 46977—October 31; 47341—October 29; 47350—October 29; 47079—October 29; 49219—November 3; 3772—November 3; and 17971 is without date.

Q. No date at all?
A. No.

Mr. RAWLINS: Now, if the Court please, I offer those notices in evidence, and ask that they be marked as plaintiff's Exhibits from 5 to whatever the number is. (1461

The COURT: Let them be admitted.

Mr. MARTIN: They are objected to, if the Court please, as incompetent, irrelevant and immaterial, on the ground that they do not show the arrival of the cars at the point to which they were shipped and billed, and at the time this demurrage accrued, the cars had not yet reached their destination; and on the ground that there is no rule in evidence under which demurrage of this character

67 can be charged.

Mr. RAWLINS: If the Court please, I might say that we will make proof in regular order; that the cars were all actually at Hammond before these notices were sent out and delivered.

Mr. MARTIN: I don't think it makes any difference; but that is a point we probably will have to thresh out anyway.

The COURT: Well, I will let them in.

Mr. MARTIN: Exception.

The COURT: Let them be admitted.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. RAWLINS: There were several that we did not seem to have any notice of.

Mr. MARTIN: What is the first one?

Mr. RAWLINS: The first one is the first page, car number 50594—about the middle of the first page.

Mr. MARTIN: 50554—all right; let's see what you have got. (Referring to paper.)

Mr. RAWLINS: I have a receipt for the arrival notice, signed by Mr. White.

Mr. MARTIN: Oh, yes.

Mr. RAWLINS:

Q. I will ask you to look at that document which I now hand you and ask you to state whether or not you know by whom, and when the stamp on the front of the page was placed there?

A. The stamp seems to have been placed there on June 6th

68 Q. By whom?

A. By myself.

Q. When you were acting as an employé of Berwind-White Coal Mining Company?

A. Yes.

Mr. RAWLINS: I desire to offer this document in evidence.

Mr. MARTIN: The same objection as to the others.

The COURT: Let it be admitted.

Mr. MARTIN: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said documents were admitted in evidence, marked as Plaintiff's Exhibits, 5 to 146½, respectively, and are in words and figures as follows, to wit:

Pl'ff Ex. 5. C. P. D.

Delivery Receipt.

*Form 607.

Pro Number.

Consignee..... Berwind-White C. M. Co..... Hammond..... .....Station H. 232...

..... *Date of Arrival*.....May.....*the*....9....*1906*

Destination..... ....Chicago, Ills..... *Date of W. B*.....5/3/06;.....*W. B. No.* 21....

Car Initials.....Erie;..... *Car No.* 54746....

Via.....C. H. & D.—P. M. Erie—C. & O..... ..... *Consignor*..... .....C. & O..... .....

Original Point of Shipment..... .....Shurmond....

Received of Erie Railroad Co., *in good order, the following described property from*.....Cinti., Ohio.....*Via.*——.

No. of Packages.	Articles and marks.	Weight.	Rate.	Amount.
	R. O. M..... 120,400	84300	124.4	52.43
	36,100	C. & O.	80.6	33.97
	May 10,—Rec'd.....			
			Total.	86.40

Original Date of Shipment,

.....*190*.... .... *Consignee.*

Original Car, Initials and Number, *Drayage.* .....

....*the.* ...*190*.... ....

Receipt must be signed on delivery of freight.

[Endorsed:] Berwind-White Coal Mining Co. Received May 10, 1906.

[NOTE.—Plaintiff's Exhibits 6 to 146½, incl., are omitted in printing. See stipulation of counsel at side, page 243.]

71 Mr. RAWLINS: Then on the next page, Mr. Martin, about two-thirds of the way down, we do not seem to have any for 11557.

Mr. MARTIN: Yes.

The COURT: I thought there was another one on that first page.

Mr. MARTIN: Yes, there was—55168.

Mr. RAWLINS: Oh, 55168.

The COURT: Yes.

Mr. RAWLINS: That, if the Court please, happens to be covered in this same document.

The COURT: The one that you have already offered?

Mr. RAWLINS: Already offered.

The COURT: All right.

Mr. RAWLINS: And 11557 car about two-thirds of the way down.

Mr. MARTIN: All right; let's see that one, Mr. Rawlins.

Mr. RAWLINS: It is the same kind of a one, signed by Mr. White, and the date is September 26th, 1906. I offer this in evidence, if the Court please. It is the same character of a document.

Mr. MARTIN: The same objection.

Mr. RAWLINS: This is your signature, and the stamp is the same as the other one you testified about?

A. Yes.

The COURT: Let it be admitted.

72 Mr. MARTIN: Exception.

Said document was admitted in evidence, marked as Plaintiff's Exhibit 148, and is in words and figures as follows, towit:

PL'FF'S EX. 148. C. P. D.

9/26/06.

Mr. A. M. De Weese, Asst. Agent, Hammond, Ind.

DEAR SIR: We have this date received arrival notice on following cars:

Initial.	Number.	Consignee.
N. W.	x 49102 √	Berwind-White C. C.
	x 55448 √	
	x 9253 √	
	x 11557 √	F.
	50573 √	304
	11192 √	
P. R. R.	x 280754 √	
	x 340009 √	

(Berwind-White Coal Mining Co
Received Sep. 26, 1906.
White.)

(Signed) ——— ———.

73 Mr. RAWLINS: 30175?

Mr. MARTIN: It is 46487, seems to be the next one mossing.

Mr. RAWLINS: All right; just a moment.

Q. I will ask you to look at this document, which I hand you, Mr. White, and calling your attention to the stamp and the initials written within the stamp, F. M. H., I will ask you to state whether or not you know whose initials those are.

A. Yes, they were initials of an employé at the office at that time, F. M. Howe.

Q. What is the date of the stamp that appears on there?

A. October 17.

Mr. MARTIN: That is 46487?

Mr. RAWLINS: Yes. I offer this in evidence.

Mr. MARTIN: The same objection as to the others.

The COURT: Objection overruled; let it be admitted.

Mr. MARTIN: Exception.

Said document was admitted in evidence, marked as Plaintiff's Exhibit 150, and is in words and figures as follows, to-wit:

73½ PL'FF'S EX. 150. C. P. D.

Mr. A. M. De Weese, Assistant Agent, Hammond, Ind.

DEAR SIR: We have this date 10/17/06 received arrival notice on the following cars:

Initials.	No.	Consignee.	
N. W.	49700	Berwind-White C. Co.	√
D. W.	8087	"	√
N. W.	46487	"	√
"	9	"	√
"	47479	"	√
"	47477	"	√
"	49676	"	√
"	3468	"	√
"	49714	"	√

(Berwind-White Coal Mining Co.,
Received Oct. 17, 1906,
F. M. H.)

Mr. RAWLINS: 49057—that is one by Mr. White himself.

Mr. MARTIN: What is the date of it?

Mr. RAWLINS: The date is October 18, 1906. I offer this document in evidence; it is the same as the others.

The COURT: Has it been identified?

Mr. RAWLINS:

Q. I will ask you to look at that and state whether or not the stamp was placed there by you upon the date shown.

A. October 18th.
Q. You say it was?
A. Yes sir.

Mr. MARTIN: The same objection as to the others.

The COURT: Let it be admitted.
Mr. MARTIN: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said document admitted in evidence was marked as Plaintiff's Exhibit 147, and is in words and figures as follows, to-wit:

75 PL'FF'S EX. 147. C. P. D.

Mr. A. M. De Weese, Assistant Agent, Hammond, Ind.

DEAR SIR: We have this date 10/18/06 received arrival notice on the following cars:

Initials.	No.	Consignee.
N. W.	45319 √	Berwind-White. √
	49430 √	" √
	49548 √	" √
	49057 √	" √

(Berwind-White Coal Mining Co.,
Received Oct. 18, 1906.
White.)

76 Mr. RAWLINS: 12545.

Mr. MARTIN: It is 48 on this. Somebody has put a little "5" there, evidently.

Mr. RAWLINS:

Q. I will ask you to look at this document, Mr. White, and ask you to state whether or not the steamp, as shown thereon, was placed by you on the date it bears?
A. Yes, it was November 3rd.

Mr. RAWLINS: I offer this in evidence.
Mr. MARTIN: The same objection as to the others.
The COURT: Let it be admitted.
Mr. MARTIN: Exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said document, admitted in evidence, was marked as Plaintiff's Exhibit 149 and is in words and figures, as follows, to-wit:

77 PL'FF'S EX. 149. C. P. D.

Mr. A. M. De Weese, Assistant Agent, Hammond, Ind.

DEAR SIR: We have this date 11/3/06 received arrival notice on the following cars:

Initials.	No.	Consignee.
N. W.	30157 V	Berwind-White. V
	3611 V	" V
	3772 V	" V
	12545 V	" V
	49219 V	" V

(Berwind-White Coal Mining Co.
Received Nov. 3, 1906.
White.)

78 Mr. RAWLINS: The last one you stated—May we refer to those bills again? I want to get the last one. Are you able to tell from that *k* in any way, Mr. White, as to the date on which it was delivered?

A. No, I cannot.

Q. There seems to be no date on it?

A. There seems to be no date on it.

Mr. RAWLINS: Well, I have no receipt apparently for that, and we will have to leave that and simply strike it from the bill of particulars, because we cannot make that proof.

The COURT: Strike out that one.

Mr. RAWLINS: Amend the bill of particulars by striking out the last item.

Mr. MARTIN: No need to amend; there is no proof.

Mr. RAWLINS: There is no use of having it in, to confuse us.

The COURT: Leave to amend——

Mr. RAWLINS: By striking out the last item in the bill of particulars.

The COURT: It is about adjournment time now. We will meet here at two o'clock.

A recess was here taken to two o'clock P. M. of this date.

79 APRIL 21, 1910—2 o'clock p. m.

Court met pursuant to recess.

VICTOR R. WHITE resumed the stand as a witness in behalf of the plaintiff, and on further direct examination by Mr. Rawlins, testified as follows:

Q. Mr. White will you please glance through these various papers which I now hand you, giving particular attention to the signature-

and initials at the bottom, and state, if you know in whose handwriting those signatures are.

A. Separately?

Q. You can just run through them and any that you find that are not *in* your own signature, you may take out.

Mr. MARTIN: Let us see what they are.

Mr. RAWLINS: They are re-consigning orders.

The WITNESS (after examining papers): These are all signed by myself.

Q. Those which you now hand me are signed by yourself?

A. Yes sir.

Q. And where was it that those were signed?

A. At the office.

Q. And while you were acting as an employee of the Berwind-White Company?

A. Yes sir.

80 Q. Do you know, Mr. White, after these had been signed by yourself, what was done with them?

A. They were sent to the agent of the Erie at Hammond, Indiana.

Q. Do you know, Mr. White, whose initials are attached or in whose writing those are at the bottom of those?

A. No, I do not know.

Q. How about this one?

A. It has no signature at all.

Q. How about this one?

A. This one here is signed by Beckman, an employee of the office.

Mr. RAWLINS: If the Court please, I offer these documents in evidence. (Referring to the papers as to which the witness had identified his own signatures).

Mr. MARTIN: They are objected — as *an* incompetent, irrelevant and immaterial.

The COURT: You offer them I suppose simply as showing the time at which the cars were ordered out?

Mr. RAWLINS: Yes, the demurrage is charged from the first seven A. M. after the notice of arrival is given, after the expiration of the free time, up to the time that the consignee gives the re-consigning order. The date of the reconsigning order is taken, and it is between those dates that we compute the car service time.

The COURT: Well, these papers show the date, do they?

Mr. RAWLINS: They show the date on which the recon-

81 signing order was made out. Your Honor can see just what they are.

The COURT: I suppose the dates are the true dates. It will be so presumed unless something is shown to the contrary.

Mr. RAWLINS: They are their own, made out by their own employees, and we do not charge them for any time after that they have put on themselves.

The WITNESS: You notice some of those cars were confiscated by the Erie Railroad Company.

Mr. MARTIN: Some of these?
A. Yes.
Q. Confiscated?
A. For Company use.

Mr. MARTIN: There ought not to be any demurrage on them.
Mr. RAWLINS: Excepting so far as they lay on the tracks after car service accrued.
Mr. MARTIN: They confiscated them and paid us for them. You took all the car service charges.
Mr. RAWLINS: Well, I renew my offer.

The COURT:

Q. Well, these are the dates that these were made out on, I suppose, these dates here?
A. Yes sir.
Q. 5/21/06 is the date at which you made this order.
A. The date the order was made and sent to the agent of
82 & 83 the Erie.

The COURT: Well, I think they are competent for that purpose.
To which ruling of the Court the defendant by its counsel, then and there duly excepted.
Mr. MARTIN: That would not figure the time under this rule they have introduced here. There are a lot of holidays, Sundays and that sort of stuff.
Mr. RAWLINS: We can't do it all at once. We will get a calendar for 1906 which will show your Sundays and Holidays, and we are not making any charges for Sundays and holidays.
The COURT: Let them be received.
Mr. RAWLINS: Going through these will be a little slower than we had to go this morning, because each one of these re-consigning orders has several cars on, so I could not get them in their exact order.
Mr. MARTIN: The same objection to all of them, to save repeating them, and I suppose the same ruling and exception.
The COURT: Yes.
Said reconsigning orders, so received in evidence were marked Plaintiff's Exhibits 152 to 248 inclusive, and are in the words and figures following, to-wit:

[NOTE.—Plaintiff's Exhibits 152 to 183 & 185 to 248, incl., are omitted in printing. See stipulation of counsel at side, page 243.]

84–86 PL'FF'S EX. 184. C. P. D.

Telephone: Harrison 379.

Berwind-White Coal Mining Company.
Fisher Building.

Order No. 235.

CHICAGO, 7/3/06.

Mr. A. M. De Weese, Agent Erie R. R. Co., Hammond, Ind.:

Please reconsign and forward to Peabody Coal Co., Lincoln & Grace Ave., Chicago:
Via C. & N. W. Ry.
Cars N. W. 50500 V
" 55924 V
Freight: Collect from the F. G. Hartwell Co.
Switching: We pay car service.
Yours truly,

BERWIND-WHITE COAL MINING COMPANY.
Per V. R. W.

[On margin:] Original.

87 Mr. RAWLINS:

Q. Mr. White, will you read from the reconsigning order number one, the number of the car or let me ask it in this way. I have the numbers. Look for 54746 Erie.
A. 54746 on May 21.
Q. All right. Turn to your next bill. Have you 42093?
A. On June 5.
Q. 31710 will be on document number 4. I think you will find it numbered 4 at the top.
A. 31710, June 11.
Q. Also 42796.
A. The same date.
Q. In document 3, have you 55693?
A. On June 12.
Q. Also 54541.
A. The same date.
Q. On document 5, do you find 48554.
A. On June 12.
Q. On document 6, do you find 42202.
A. On June 13.
Q. Also 45374.
A. June 13.
Q. Document 7, do you find 45374?
A. No.
Q. Pardon me, do you find 167456?

A. On June 14.
Q. Document 8, do you find 8931?
A. On June 15.
Q. Document 9, do you find 11651?
A. June 16.
Q. Document 10, do you find 11010?
A. June 16.
Q. And 52912?
A. The same date.
Q. On Document 11, do you find 18665.
A. June 18.
Q. On Document 12, do you find 55168?
A. June 19.
Q. Document 13, do you find 54260?
A. June 21.
Q. And 51013?
A. The same date.
88 Q. Document 14, do you find 45922?
A. June 21.
Q. Document 15, 9095?
A. June 20.
Q. Also 50868?
A. The same date.
Q. On 16, do you find 54538?
A. June 22.
Q. On 17, do you find 52706?
A. June 22.
Q. And 50554?
A. The same date.
Q. On 18 do you find 52905?
A. June 23.
Q. And 52666?
A. The same date.
Q. And on 19 do you find 53089?
A. June 25.
Q. Also 52567?
A. The same date.
Q. On Document 20 do you find 51035?
A. I can't see the date, it looks like it might be 21 or 24.
Q. Would it be the 26th?
A. The 26th, that is right.

Mr. MARTIN:

Q. Is that right, or is there any doubt about it?
A. No, it is all right I guess.
Q. What?
A. It is all right.
Q. The 26th.

Mr. RAWLINS:

Q. How about 52047?

A. The same date.
Q. On Document 21 do you find 54935?
A. The 27th.
Q. And 51899?
A. The 27th.
Q. Document 22, do you find 54787?
A. June 30.
Q. And 11290?
A. The same date.
Q. Document 23, do you find 9381?
A. The 29th of June.
Q. 49483?
A. The same date.
89 Q. Document 24, do you find 11231?
A. June 6th.
Q. And 9638?
A. The same date.
Q. Document 25, do you find 53900?
A. June 5.
Q. And 52492?
A. The same date.
Q. 26 on the next page 26, do you find 9851?
A. July 7.
Q. And 47366?
A. The same date.
Q. Number 27, car 8086?
A. July 9.
Q. Number 28, car 12384?
A. July 18.
Q. Number 29, do you find 51167?
A. July 23.
Q. And 54381?
A. The same date.
Q. Document 30, do you find 7469?
A. July 24th.
Q. Number 31, do you find 7536?
A. July 26th.
Q. 32, do you find 49839?
A. June 28th.
Q. And 45170?
A. The same date.
Q. That is 28th. There seems to be a mistake here. There is no change in that order or anything?
A. There doesn't seem to be.
Q. 33, do you find 50500?
A. July 3.
Q. And 55924?
A. The same date.
Q. Document 34, do you find 8708?
A. July 9.
Q. And 8449?

A. The same date.
Q. 35, do you find 12047?
A. July 20.
Q. And 7480?
A. The same date.
90 Q. Number 36, do you find 378064—do you find 378064—not that—just a moment, 45850?
A. July 31.
Q. And 378064?
A. The same date.
Q. And 41792?
A. The same date.
Q. On 37 do you find 132?
A. July 31.
Q. On 38 do you find 50519?
A. August 2.
Q. On 39 do you find 9181?
A. August 14.
Q. On 40, do you find 53922?
A. It don't seem to be here.
Q. Look at the bottom, there were a couple that we took out and handed back.
A. All right, what is that number?
Q. 53922.
A. August 7.
Q. And 5322?
A. Either 221 or 222, August 7.
Q. On 49, do you find 8929?
A. August 15.
Q. And 11797?
A. The same date.
Q. On 42, do you find 55127?
A. August 17.
Q. And 54498?
A. 54498.
Q. The same date?
A. The same date.
Q. That is the 17th?
A. The 17th, 54498.
Q. On 43, do you find 287136?
A. On October 4.
Q. On 44 do you find 49102?
A. October 5.
Q. On 45, do you find 280754?
A. October 4.
Q. On 46, do you find 340009?
A. That is October 6.
Q. And 9255?
A. The same date.
Q. On 47, do you find 55448?

A. I have that here. You won't find that in your list.

91 A. You missed 46½ here.

Q. Yes, on 46½, 9493?

A. October 10.

Q. On 48, do you find 45303?

A. October 11.

Q. That is on 48?

A. On 48.

Q. The number is?

A. 45303 on October 11. That is correcting order of October 10.

Q. On 49, do you find 47061?

A. October 10.

Q. Numbers 50, 51, 52 and 53 are not in there now. On number 54 do you find 47678?

A. October 10.

Q. On 55, do you find number 11557?

A. On the 12th.

Q. On 56 do you find 9209?

A. On the 15th.

Q. And 10264?

A. The same date.

Q. On 57, do you find 11163?

A. The 13th.

Q. And 50573.

A. The 13th.

Q. On 58, do you find 11346?

A. The 15th.

Q. On 59, do you find 8135?

A. The 16th.

Q. On number 60—no, 59.

A. You missed a car.

Q. 8657?

A. On the 16th.

Q. On 60, do you find 11061?

A. The 17th.

Q. On 61, car 8976.

A. On the 18th.

Q. On 62, car 2344?

A. The 19th.

Q. On car 63, car 292711?

A. On the 18th.

Q. And 19841?

A. On the 18th.

Q. On 64, car 370022?

A. The 22nd.

Q. On 65, car 877151?

A. October 31.

92 Q. Are there any memoranda attached to that one, Mr. White?

A. Why, that was originally dated 11/1, and 10/31 written over it in ink. Down below here, sent bill to 51st street on November 2.

That evidently was returned, because another car on the original re-consigning order, 292705, was confiscated by the order of J. P. S., October 23.

Q. What is the first date that appears on the page?

A. 10/22.

Mr. MARTIN: Well, 877151, does it show it was confiscated?

A. No, 292705 on the same order was confiscated. The date of the original order was 10/22.

Mr. RAWLINS:

Q. Number 66, car 7872?
A. October 23.
Q. On 67, car 5864?
A. The same date.
Q. On 68, car 49700.
A. October 24.
Q. On 69, car 280775.
A. On the 24th.
Q. On 70, car 46487.
A. The same date.
Q. On 71, car 47477?
A. October 25.
Q. On 72, car 47199?
A. On the 25th.
Q. On 73, car 49676?
A. The 26th.
Q. On 74, car 76639?
A. On the 25th.
Q. On 75, car 10112?
A. On the 30th.
Q. And 3468?
A. The same date.
Q. On 76, car 30138?
A. The 31st.

93 Q. And car 30121?
A. The same date.

Q. On 77, car 49714?
A. November 1.
Q. And 49057?
A. The same date.
Q. On 78, car 30174?
A. November 1.
Q. On 79, car 47918?
A. November 2.
Q. And 45319.
A. The same date.
Q. On 80, car 49548?
A. November 2.
Q. On 81, car 3800?
A. November 2.
Q. On 82, car 25945?

A. November 3.
Q. On 83, car 41472?
A. November 5.
Q. On 84, car 46952?
A. November 7.
Q. And car 47253?
A. The same date.
Q. On 85, car 49430?
A. November 5.
Q. On 86, car 2118?
A. November 9.
Q. Also car 6030?
A. The same date.
Q. On 87, car 41623?
A. November 10.
Q. And car 47366?
A. The same date.
Q. On 88, car 42069?
A. November 12.
Q. On 89, car 47784?
A. November 12.
Q. On 90, car 40949?
A. November 13.
Q. On 91, car 40066?
A. November 13.
Q. On 92, car 48922?
A. November 13.
Q. On 93, car 46882?
A. November 14.
Q. Also 46183?
A. The same date.
Q. On 94, car 45388?
A. November 15.
94 Q. On 95, car 45521?
A. November 21.
Q. On 96, car 49716?
A. On November 23.
Q. On 97, car 46040?
A. November 23.
Q. And 46977?
A. Same date.
Q. On 98, car 4790&?
A. November 21.
Q. Is there any other memorandum attached to that bill?
A. Yes, "Sent to O'Gara Coal Company."
Q. What I want to get at is, is there any earlier date or later date as to the mailing?
A. 11/21 is the earliest date shown.
Q. Is the date 11/24 upon it anywhere?
A. On the O'Gara Coal Company envelope, United States postal stamp on there, November 24, is the only place it shows.

Q. On 99, car 30157?
A. November 24.
Q. And 70522?
A. The same date.
Q. On 100, car 47341?
A. November 27.
Q. And 47350?
A. The same date.
Q. Also 47079?
A. The same date.
Q. On 101, car 49219?
A. November 28.
Q. And 12545?
A. November 28.
Q. And 3772?
A. The same date.
Q. On 102, car 17971——

Mr. MARTIN: That is the one you eliminated.
Mr. RAWLINS: Oh yes, that one is out.

95 Q. Mr. White, when was it that you commenced working for the Berwind-White Company?
A. April 1, 1906.
Q. That was about a month before these bills commenced that you have been testifying about?
A. I think so.
Q. Do you know, Mr. White, whether or not during the summer of 1906 the Berwind-White Company had storage tracks or yards in the City of Chicago?

Mr. MARTIN: That is objected to as incompetent, irrelevant and immaterial. We are not bound to furnish storage tracks.
Mr. RAWLINS: If the Court please, the statement has been made here and the objection raised that we stopped these cars some place outside, did not bring them to any particular point in the city of Chicago. Now I want to show, if I may be permitted in the face of that objection, what the situation was as to where the Berwind-White Company had or wanted to receive these cars of coal.
The COURT: Well, weren't any explicit instructions given in this case?
Mr. RAWLINS: Not one, it was simply a flat consignment to Chicago, Illinois.
The COURT: No instructions given by the consignee?
Mr. RAWLINS: No, except when these re-consigning orders were given. As the Court can see, we were then told where in the city of Chicago, to what concern they wanted us to send and de-
96 liver these cars; but I gather from the statement which has been made earlier in the case that they are claiming as one of the reasons why we should not collect this car service, that we stopped them down at Hammond.
The COURT: Was there any custom between these people as to where coal was delivered in other cases?

Mr. RAWLINS: It was all handled exactly the same as these cars were. We will show that later on.

Mr. MARTIN: Custom, I understand it, could not change the law, if there was one. The law fixes exactly what should be done.

The COURT: I think it is competent.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. RAWLINS: You may answer it if you know.

A. I don't know of any.

Q. You don't know of any that they had?

A. No.

A. M. DE WEESE, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. What is your full name?

A. A. M. Deweese.

97 Q. What is your occupation?

A. I am entitled "Assistant Agent of the Erie Railroad Company, Hammond, Indiana."

Q. Do you have custody or charge of the files and records of the Company at that point?

A. Yes, sir.

Q. I will ask you to look at these documents which I hand you and ask you to state whether or not they are or have been a part of the files of your Company.

A. They have, yes sir.

Q. How did they come into your possession?

Mr. MARTIN: His possession?

Mr. RAWLINS: His possession and the possession of the Company.

Mr. MARTIN: I want to see if he knows how they came in possession of the Company.

The WITNESS: They came to us by United States mail.

Mr. RAWLINS:

Q. Were you in the employ of the Erie Railroad Company at Hammond in 1906?

A. I was, yes.

Q. During the spring, summer and fall?

A. From January 20, 1906, to date.

Q. Are those in the same condition as they were in when you received them so far as figures, writings and memoranda upon them appear?

A. They are, yes sir.

Mr. RAWLINS: If the Court please, I wish to offer these five documents in evidence. They are re-consigning orders similar

98 to those which are identified by Mr. White, with the exception that Mr. White's signature was not attached on their face.

They — written upon the letter head of the Berwind White Coal Mining Company, Fischer Building, Chicago, Illinois.

Mr. MARTIN: They are objected to for the same reason as the others, and that the signature is not shown.

The COURT: Well, as to the last objection you might prove them all as to what if anything, the witness did after that.

Mr. RAWLINS:

Q. Do you know whose signature or initials are attached to those?

Mr. MARTIN: Let him answer yes or no.

Mr. RAWLINS:

Q. Just answer yes or no, whether you know or do not know.

A. Which do you refer to?

Q. Well, the first one has no signature; but one is received from the Hartwell Company, signed—it looks like a "W".

A. I couldn't say who put that on there.

Q. And about these four—there seems to be an "A. M. D."

A. Those are my initials but I could not state who put them there.

Q. Were they put there by yourself?

A. It was done in my office.

Q. After the receipt of those papers what if anything was
99 done with them?

A. We re-consigned the cars according to the instructions contained upon them.

Mr. MARTIN: I object unless he actually knows.

Mr. RAWLINS:

Q. Do you know, Mr. Deweese, whether or not the cars were re-consigned in accordance with these instructions?

Mr. MARTIN: He can state what he did.

A. They were, yes sir.

Mr. MARTIN: I object and ask that it be stricken out. He may state what he did.

The COURT: I think it is competent. He says he knows they were re-consigned.

Mr. RAWLINS: He is the agent at that point. I don't know what more we could have. I renew my offer of these if the Court please. They were received through the mails in the ordinary course of business. I don't know how we could identify every employee of every man who sends the company a paper.

The COURT: I think they are competent.

Mr. RAWLINS: I will now withdraw Mr. Deweese temporarily if I may do so.

Now, Mr. Martin, will you finish checking these reconsigning orders. Number 47 on the second page, car 55448, date 10/11.

Mr. MARTIN: That is right.

100 Mr. RAWLINS: Just above it, 8534, the same date.

Mr. MARTIN: Yes.

Mr. RAWLINS: Just a little below, car 47464, the same date.
Mr. MARTIN: Yes.
Mr. RAWLINS: On number 53, car 46920, a little above, the same date.
Mr. MARTIN: Yes.
Mr. RAWLINS: And just above it, car 10212, the same date, 10/11.
Mr. MARTIN: Yes.
Mr. RAWLINS: Number 966, is 10/22.
Mr. MARTIN: And 5864.
Mr. RAWLINS: Lo/23.

The defendant's objection was overruled, and the said documents were received in evidence, marked Plaintiff's Exhibits 249 to 253 inclusive.

To which ruling of the Court the defendant, by its counsel then and there duly excepted.

Said documents so admitted in evidence and marked Plaintiff's Exhibits 249 to 253, are in the words and figures following, to-wit:

101 PL'FF'S EX. 249. C. P. D.

Berwind-White Coal Mining Company,
Peoples Gas Building.

Order No. 474.

CHICAGO, 10/11/06.

Mr. A. M. De Weese, Agent, Erie R. R. Co., Hammond, Ind.:

Please reconsign and forward to Otis Elevator Co., 16th & Laflin Street-, Chicago, Ill.

Via, C., B. & Q. Ry.
Cars, N. & W. 46920. √

[On margin:] Original.

Oct. 12, 1906.—Freight: Follows, we guarantee.
Switching: We pay car service.

Yours truly,

BERWIND-WHITE COAL MINING COMPANY,
Per A. M. D.

PL'FF'S EX. 250. C. P. D.

Berwind-White Coal Mining Company,
Peoples Gas Building.

Order No. 471.

CHICAGO, 10/11/06.

Mr. A. M. De Weese, Agent, Erie R. R. Co., Hammond, Ind.:

Please reconsign and forward to F. G. Hartwell Co., 14th & Clark Street-, Chicago.

Via, ——.
Cars, N. & W. 10212. V V

Oct. 12, 1906.

[On margin:] Original.

Oct. 12, 1906.—Freight: Follows, we guarantee.
Switching: We pay car service.

Yours truly,

BERWIND-WHITE COAL MINING COMPANY,
Per A. M. D.

PL'FF'S EX. 251. C. P. D.

Berwind-White Coal Mining Company,
Peoples Gas Building.

Order No. 471.

CHICAGO, 10/11/06.

Mr. A. M. De Weese, Agent, Erie R. R. Co., Hammond, Ind.:

Please reconsign and forward to H. McBride, Elgin, Ill.

Via, C., M. & St. P. Ry.
Cars, N. & W. 8534. V

[On margin:] Original.

Oct. 12, 1906.—Freight: Follows, we guarantee.
Switching: We pay car service.

Yours truly,

BERWIND-WHITE COAL MINING COMPANY,
Per A. M. DE W.

PL'FF's Ex. 252. C. P. D.

Berwind-White Coal Mining Company,
Peoples Gas Building.

Order No. 475.

CHICAGO, 10/11/06.

Mr. A. M. De Weese, Agent, Erie R. R. Co., Chicago, Ill.:

Please reconsign and forward to L. O. Rand, 73rd & Belt Ry., Chicago, Ill.

Via, Belt Ry.

4
Cars, N. & W. 17464.

Car was billed as 17464; should *of* been 47464.

Oct. 12, 1906.—Freight: Collect from the F. G. Hartwell Co.
Switching: We pay car service.

Yours truly,

BERWIND-WHITE COAL MINING COMPANY,
Per A. M. D.

PL'FF's Ex. 253. C. P. D.

F. G. Hartwell Co.,
1308 Fisher Building,

Order No. 1814.

CHICAGO, *Oct.* 11, 1906.

Mr. A. M. De Weese, Agt., Chicago & Erie R'y.

DEAR SIR: Please reconsign car N. & W. 55448 ∨ to Pintsch Compressing Co., Archer Ave. & Hough Pl., via C. & A.
Collect charges this office.
Oct. 12, 1906.

Yours truly,

F. G. HARTWELL CO.,
By W. M.

Mr. A. M. De Weese, Agent, Erie R. R. Co., Hammond, Ind.:

Please reconsign and forward to F. G. Hartwell Co., Chicago, Ill.

Via, ——.
Cars, N. & W. 55448.

[On margin:] Original.

Freight: Follows, we guarantee.
Switching: We pay car service.

Yours truly,

BERWIND-WHITE COAL MINING COMPANY,
Per —— ——.

102 ERNEST J. METTLER, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. What is your name, please?
A. Ernest J. Mettler.
Q. What is your business?
A. Car tracer for the Standard Steel Car Company.
Q. What was your occupation during the latter part of the summer of 1906?
A. Ticket seller.
Q. Of 1906?
A. Yes sir.
Q. And in the fall of 1906 were you employed by the Erie Railroad Company?
A. Yes sir.
Q. At what, I mean in what capacity?
A. Why, to sell tickets and send arrival notices for coal.
Q. Did you at that time keep any record or have anything to do with the checking up of the records of the arrival of cars at Hammond, Indiana?
A. Yes sir.
Q. How would you do that, Mr. Mettler?
A. Do you want me to explain how it was done?
Q. Yes, explain in detail just what was done. First, did you keep any books or records showing the date of the arrivals of cars at Hammond, cars of coal?
A. Yes sir.
Q. How was that book made up?
103 A. It was like an expense bill or a way bill copied and put through a big book like that book there.
Mr. MARTIN: I didn't get that, who made them did you say?
Mr. RAWLINS: He hasn't got that far as to who made them.
Q. Just to start on, in order to get it more clearly, I will ask you to look at the book which I now hand you, Mr. Mettler, and state whether or not that is the book to which you have referred?
A. Yes sir.
Q. Now, how is that book made up? How do they make it; how did the clerks and employees of the railroad company make that book, from what memorandum, everything about it.
A. From the expense bill.
Q. Now calling your attention particularly to the dates which show or purport to show the arrival of cars, from what is that memorandum made?
A. From the card way bill.
Q. Describe what the card way bill is.
A. Why it is a running slip that the car is billed out at its originating point coming through to Hammond.
Q. And from whom do you get it at Hammond?

A. We get it from the agent.
Q. And then upon receipt of it from the agent, what do you do?
A. I take it and mark it the day the car came in and send them a notice on it.

104 Q. Is this a slip which accompanies the car?
A. Yes sir.

Q. I will ask you to look at the column showing the arrival, the notices of arrival of cars and ask you to state in whose handwriting it is, Mr. Mettler?
A. My own.
Q. And that memorandum you say was taken from the billings that accompanied the car, or from the slip that accompanied the car?
A. Yes sir.
Q. Do the dates which appear in that book correspond with the dates upon which you received the billing or slips?
A. The card slips?
Q. Yes.
A. Yes sir.

Mr. RAWLINS: If the Court please, I offer this book in evidence for the purpose of showing the time of the arrival of the cars shown in it at Hammond, Indiana.

Mr. MARTIN: It is objected to because the information as it comes to him is secondary. It is given to him by agents and made up from their slips, and so forth, and there is no showing that the slips are correct.

The COURT: Well, you are familiar with that last decision of our Supreme Court in the Pennsylvania case, I suppose.

Mr. MARTIN: Yes, I am.

The COURT:

Q. What became of these way bills, as you call them?
105 The WITNESS: The car slips?

The COURT:

Q. Yes.
A. They were filed.
Q. You simply copied those in there, you didn't actually see the cars yourselves?
A. Yes sir.
Q. Oh, you saw the cars?
A. Yes sir, and put the date in there.
Q. I asked you if you saw the cars themselves?
A. No, not the cars.
Q. You simply copied the cards in here.
A. Yes sir.
Q. And you still have those cards, that is the Company has?
A. The Company has.

The COURT: I don't know but you would have to produce those cards.

Mr. RAWLINS: No, I do not believe we are required to go to all

that detail and trouble, under all of the recent decisions on that proposition.

The COURT: Well, the Pennsylvania case of course, amounts to almost a new doctrine; it did permit testimony that was not unlike this; but still the Court laid down there the general rule that you had to produce the best evidence you could.

Mr. MARTIN: Of course, and remember they produced copies of the original there.

The COURT: Not on both the records. Inasmuch as it appears these way bills are in existence I do not know but you ought
106 to be required to produce them.

Mr. RAWLINS: These cannot be produced now. This man is not now and has not been for some time, in the employ of the Company.

The COURT: You may be able to show that by another witness, but so far as the present witness on the stand knows, you have got those way bills.

Mr. RAWLINS: My own opinion is that this is not new law. It is a new expression by the Supreme Court of Illinois, but other states have passed on it.

The COURT: It has been repeatedly held as to time cards, for instance, that if the time cards are in existence they must be produced.

Mr. RAWLINS: For the time being I will withdraw this witness and go on with the rest of the case and I think if we have them we can get them and get them in here; though I don't think it is essential under the condition of the proof in this case, to prove any more than has already been proven in the record.

(Witness withdrawn.)

107 A. M. DE WEESE, recalled as a witness in behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. You are the same gentleman who was on the stand just a moment ago?

A. Yes sir.

Q. Will you tell us again, Mr. De Weese, just what your position is with the Erie Railroad Company?

A. Assistant Agent.

Q. At Hammond, Indiana?

A. Yes sir.

Q. How long have you been employed by the Erie Railroad Company?

A. About twenty-five years.

Q. And how long in Hammond and Chicago and vicinity?

A. Since January 20, 1906.

Q. I will ask you to state if you know, whether or not there is any custom or usage on the part of the Erie Railroad Company as to the

place where and the manner in which cars, in which freight is held which is consigned flat to Chicago.

Mr. MARTIN: That is objected to on the ground that the Erie Railroad by itself could not create a custom in the first place and in the second place, that it does not make any difference whether
108 there was a custom or not, that there was a legal duty for which they were paid, that they must bring the cars through to destination before they could charge demurrage.

The COURT: I think as a general custom it is competent, if it has been in force some time and well established.

To which ruling of the Court the defendant by its counsel, then and there duly excepted.

A. All coal that is billed flat to Chicago is held at Hammond, Indiana, for reconsignment, and has been, I could not say how many years; it was going on when I came to that point.

Mr. RAWLINS:

Q. Has it ever been the custom or is it now the custom to bring coal freight that is consigned flat to Chicago, into the city?

A. No sir.

Q. In what manner and how are cars handled after the reconsigning orders are received?

A. They are forwarded to the destination as instructed in the reconsigning order received from the original consignee.

Cross-examination.

By Mr. MARTIN:

Q. These cars were held out there for the convenience of the road in making switches to the belt lines, is that the idea?

109 A. Well, I presume that it was; or in other words, that is a regular hold out yards of the Erie Railroad for holding the coal which is subject to reconsigning orders.

Q. That is so if they haul it into Chicago, they would not have to haul it back out to the Belt line or some other place, or to some other road?

A. Well, yes, it is very probable that they would, for this reason——

Q. You need not state any reason. You have answered the question.

EUGENE E. LOOMIS, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. Please state your name.

A. Eugene E. Loomis.

Q. What is your occupation, Mr. Loomis?

A. Local freight agent for the Chicago & Erie Railroad at Chicago & Hammond.

Q. How long have you been in the employ of the Erie Railroad Company in that capacity?

A. I have been employed as freight agent at Chicago since 1888, and since January, 1906, agent at both stations.

Q. Are you familiar with the customs and usages of the
110 Erie Railroad Company as to the handling of freight which is consigned to Chicago, Illinois, flat?

A. Yes sir.

Mr. MARTIN: I object, if the Court please, as incompetent, irrelevant and immaterial for any purpose. Custom cannot make any difference where there is positive law. It is not binding upon the defendant in this case.

The COURT: The objection is overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. RAWLINS:

Q. Will you state to the court and jury Mr. Loomis, what the custom is and has been as to the storing and handling of freight consigned to Chicago as I have indicated.

A. Why, upon receipt of the freight, we send out notices of its arrival to consignees, and await their orders for its disposition.

Q. Where in the meantime, is the freight held or stored?

A. Car load freight at Hammond.

Q. How long has that custom and practice been in vogue, Mr. Loomis?

A. Well, it must be fifteen years or more, possibly twenty.

Q. That freight has been held, consigned flat to Chicago, has been held at Hammond?

A. Car load freight.

Q. Awaiting orders.

A. Yes sir.

111 A. M. DE WEESE, recalled as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. In your testimony previously given you stated that car loads of freight billed flat to Chicago were held at Hammond, Indiana awaiting re-consigning orders. I will ask you Mr. De Weese, to state when if you know, with reference to the arrival of cars at Hammond, Indiana, arrival notices are sent out.

Mr. MARTIN: That is objected to because he does not pretend to know anything about when they were sent with reference to these particular cars, and a custom, or their system of doing business, does not prove anything with reference to this.

Mr. RAWLINS: It is a custom with reference to all cars.

Mr. MARTIN: They say here that whenever they got a certain car they sent out notices, the other witnesses say.

Mr. RAWLINS: If he knows when with reference to the arrival—The only question here is whether or not this notice was sent out before or after the car got to Hammond.

112 Mr. MARTIN: He does not pretend to have sent the notices out himself. His instructions to his people under him would not prove anything. He wouldn't know whether they were carried out or not.

Mr. RAWLINS: He knows what the course of business is.

Mr. MARTIN: That is not a competent way of proving that a thing was done.

The COURT: You are attempting to prove in this way what date they arrived in Hammond.

Mr. RAWLINS: No, I don't care anything about the date they arrived in Hammond, if I prove that the notice of arrival was not sent out until after the car arrived.

The COURT: It is the same thing. You have proved the date of the notice. Now you want to show that the car was there.

Mr. RAWLINS: That it was after the date the car arrived.

Mr. MARTIN: He must prove that by somebody that knew the facts, not by a custom.

The COURT: I doubt whether that would be competent. It is susceptible of direct proof. You can prove when the cars got there.

Mr. RAWLINS: Suppose the car had been there for a month before we sent out the arrival notice; we are claiming only from the date the arrival notice was delivered to the Berwind-White people.

113 The COURT: You may ask him what his knowledge was, as to what he did in regard to cars, whether he had any actual supervision of the yards.

Mr. RAWLINS:

Q. Mr. De Weese, what are your duties at Hammond, Indiana, in reference to your work with the Erie Railroad?

A. Well, they are so very numerous that I don't believe I could cover it all.

Q. Well, particularly with the matter in hand, Mr. De Weese, with the question of the sending out of arrival notices of cars and the keeping of records and memoranda of the same.

A. It is my duty to see that such work is done.

Q. Do you have anything to do with the making up of records yourself, or is that all done by men in your employ?

A. Well, those records are kept by men who are under me.

Q. Under your supervision?

A. Yes sir.

Q. By whom are instructions given to those men?

A. By myself.

Mr. MARTIN: I object, if the Court please. It don't make any difference whether he gave instructions.

The COURT: I think it is competent.

Mr. RAWLINS:

Q. Now I will ask you to look at those books, Mr. De Weese. Before looking at these, what are the instructions given to employees with reference to the sending out of arrival notices of cars.

114 Mr. MARTIN: That is objected to as incompetent, irrelevant and immaterial. It is not a question of what instruction he gave them, it is a question of what they did with these particular shipments. They are bound to show that the cars were there, and that they notified us that they were there. Now the fact that he instructed somebody to do that as fast as the cars came in, had a custom of that kind, doesn't prove anything.

The COURT:

Q. Do you know anything personally about it? Do you see the cars and see the notices, or don't you?
A. No sir.
Q. You don't see them at all?
A. No.

The COURT: Well, where are these people that do make these entries?
Mr. RAWLINS: They are scattered to the four winds.
The COURT: Well, does the witness know where the men are?

Mr. RAWLINS:

Q. Do you know where the men are that made up those records, Mr. De Weese? You have two here I understand.
A. We have two in the room. Those are the only ones that I know where they are.

The COURT:

Q. Are the others in your employ or are they not?
A. They are not.
Q. Not in your employ?
A. No.

115 Q. Are they in the State of Illinois or not so far as you know?
A. I couldn't say where they are located at all.

Mr. MARTIN: Have you made any effort to locate them?
Mr. RAWLINS: I think he has. Let me withdraw Mr. De Weese. I think I can establish it by one of the men who actually made up the record.

(Witness withdrawn.)

JOSEPH N. STEBBINS, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your name, please?
A. Joseph N. Stebbins.
Q. What is your business, Mr. Stebbins?

A. I am acting in the capacity of traffic manager for the Standard Steel Car Company.

Q. What was your occupation in the spring of the year 1906?

A. I was ticket agent in Hammond, and re-consigning clerk for Mr. De Weese at Hammond for the Erie Railway.

Q. Did you have anything to do with the making up and sending out of arrival notices?

116 A. I sent out the arrival notices on the arrival of the cars.

Q. Just how did you make those arrival notices up?

Mr. MARTIN: I object to his conclusion that he sent them on the arrival of the cars, unless he knows.

The COURT: He is stating facts as I understand it. Let it stand.

Mr. RAWLINS: Yes.

Q. How would you make them up and what was the general plan, general scheme that you went through?

A. The cars were billed at the originating point and there would be a revenue bill mailed to Hammond. An expense bill was made up from the revenue bill at Hammond, and the cars actually traveled on a running slip. As soon as the conductor came in with a train of coal he would have a running slip for each car. Those I got and filled out the expense bill already made out and tore off, I believe there was a fourth copy mailed, given to whoever the consignee might be.

Q. Did you ever send out an arrival notice until the conductor's slip had been delivered to you?

Mr. MARTIN: I object. It don't make any difference whether he did or not. The question is what he did in this case.

The COURT: I think it is competent in this case, let

117 him answer.

To which ruling of the Court the defendant, by its counsel then and there duly excepted.

A. I never did to my knowledge. It was through error if I ever did.

Mr. RAWLINS:

Q. Did you keep any memorandum of the dates on which you sent out these arrival notices?

A. I did.

Q. During what period of the summer of 1906 were you in the employ of the Erie Railroad Company?

A. I believe it was about the first of March until about the latter part of June, 1906.

Q. I will ask you to look at this book which I hand you and ask you to state whether or not that is the book in which you kept or made a memorandum of the sending of arrival notices and the delivery to you of the slips.

A. This is the book.

Q. And are the entries that are in that book made, do there appear entries of all the orders which you sent out during that time?

Mr. MARTIN: That is objected to. The book shows for itself what appears there.

Mr. RAWLINS:

Q. Well, in whose handwriting is it?
A. Why part of this is mine.
Q. And are the entries there referring to the dates upon
118 which the re-consigning order or the arrival notices are sent out, and which are made in your handwriting, are those the dates, do those show correctly the dates upon which they were sent out?
A. They do.
Q. And as I understand you, the arrival notices were not sent out until the slip accompan-ing the car had been delivered to you.
A. That is it exactly.

Mr. RAWLINS: Now, if the Court please, I offer this book in evidence.

Mr. MARTIN: It is objected to. He says he made it up from slips that were handed to him.

Mr. RAWLINS: Here it is, the car travels with the slip. When it got to Hammond, Indiana, the slip was handed to him and he then sent out the arrival notice. Now if that doesn't show that the car was there before the arrival notice was sent out, what proof would show it?

Mr. MARTIN: Why, you have to have the conductor who gave him these slips, somebody that knows these slips were correct.

Mr. RAWLINS: It don't make any difference what is on the slip, if it was with the car. He said it accompanied the car.

Mr. MARTIN: He said the conductor gave him these slips. He never saw a car.

The COURT: Well, they were supposed to be slips of cars
119 that were already in there, that was all. The conductor brought them, they were supposed to be slips representing his train.

The WITNESS: His train, that's it exactly. And there was a sheet covering the same, a train sheet.

The COURT: I think that is competent.

Mr. MARTIN: Save an exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The said book was marked Plaintiff's Exhibit A and portions of it were received in evidence, which said portions are in the words and figures following, to-wit:

PLAINTIFF'S "EX. A."

Car. Initials.	Number.	Pro number.	Date arrival.	Date way-bill.	Way-bill No.	Consignee.	Point of origin.		Am't freight.	Remarks.
Erie	54746	232	5-10	5-3	21	Berwind White C. M. Co.	Berwind.	660	67.65	
N. & W..	42093	669	5-22	5-17	232	Berwind White C. M. Co.	Cin'ti, O.	490	64.93	
L.S.&M.S.	31710	935	5-26	5-18	129	Berwind W. C. M. Co....	Cin'ti...	894	91.63	
Erie	42796	719	5-23	5-18	128	Berwind W. C. M. Co....	Cin'ti...	960	98.40	
N. & W..	55693	818	5-25	5-21	240	Berwind W. C. M. Co....	Berwind.	965	98.71	
Erie	48554	715	5-22	5-12	79	Berwind W. C. M. Co....	Cin'ti....	758	77.70	
N. & W..	54541	775	5-23	5-18	235	Berwind W. C. M. Co....	Berwind.	1022	104.75	
N. & W..	42202	774	5-25	5-18	234	Berwind W. C. M. Co....	Berwind.	660	67.65	
Erie	45374	816	5-25	5-19	238	Berwind W. C. M. Co....	Berwind.	854	87.54	
P. R. R..	167456	99	6-7	6-5	73	Berwind W. C. M. Co....	Marion..	636	65.19	
N. & W..	8931	149	6-7	6-1	270	Berwind White & Co....	Berwind.	502	51.46	
N. & W..	11010	469	6-7	5-31	265	Berwind W. C. M. Co....	Berwind.	620	63.55	
N. & W..	52912	1497	6-7	6-5	262	Berwind W. C. M. Co....	Berwind.	1004	102.91	
N. & W..	11651	1229	5-31	5-26	249	Berwind W. C. M. Co....	Berwind.	618	63.35	
C., H.&D.	18655	716	5-22	5-12	80	Berwind W. C. M. Co....	Cin'ti...	854	87.53	
N. & W..	55168	1388	6-4	5-28	258	Berwind W. C. M. Co....	Berwind.	1006	103.11	
N. & W..	50868	430	6-13	6-6	275	Berwind W. Co.....	Berwind.	1046	107.22	
N. & W..	9095	429	6-13	6-5	271	Berwind W. C. M. Co....	Berwind.	503	51.56	
Erie	45922	1278	6-2	5-23	171	Berwind W. C. M. Co....	Cin'ti...	872	89.38	
N. & W..	54260	303	6-8	6-4	268	Berwind W. C. M. Co....	Berwind.	977	100.14	
Erie	51013	1047	5-31	5-18	130	Berwind W. C. M. Co....	Cin'ti...	1127	115.52	
N. & W..	52706	471	6-6	5-31	267	Berwind W. C. M. Co....	Berwind.	1012	103.72	
N. & W..	50554	1385	6-4	5-28	255	Berwind W. C. M. Co....	Berwind.	1022	104.75	
N. & W..	54538	1227	5-31	5-26	247	Berwind W. C. M. Co....	Berwind.	990	101.48	
N. & W..	52905	1232	5-31	5-26	252	Berwind W. C. M. Co....	Berwind.	987	101.17	
N. & W..	52666	1228	5-31	5-26	248	Berwind W. C. M. Co....	Berwind.	982	100.65	

N. & W..	53089	1230	5-31	5-26	250	Berwind W. C. M. Co....	Berwind.	975	99.94
N. & W..	52567	1231	5-31	5-26	251	Berwind W. C. M. Co....	Berwind.	678	64.41
N. & W..	51035	1385	6-2	5-28	253	B. W. C. M. Co.....	Berwind.	1030	105.57
N. & W..	52407	1386	6-2	5-28	256	Berwind W. C. M. Co....	Berwind.	1006	103.12
N. & W..	54935	1384	6-2	5-28	254	B. W. C. M. Co.....	Berwind.	1011	103.63
N. & W..	49839	976	5-28	5-22	243	Berwind C. M. Co.....	Berwind.	981	100.55
N. & W..	45170	1069	5-30	5-24	246	Berwind W. C. M. Co...	Berwind.	898	92.05

121 "EXHIBIT A."

N. & W..	51899	817	5-28	5-21	239	Berwind W. C. M. Co....	Berwind.	990	101.47
P.F.W.&Co.	9381	1113	5-30	5-28	511	Berwind White.....	Berwind.	534	54.73
N. & W..	49483	667	5-29	5-23	244	Berwind W. C. M. Co....	Berwind.	999	102.39
N. & W..	54787	869	5-28	5-17	239	Berwind W. C. M. Co....	Berwind.	1018	104.35
N. & W..	11290	362	6-11	6-8	264	Berwind White C. M. Co.	Bernard.	620	63.55
N. & W..	50500	1470	6-7	5-31	1266	Berwind W. C. M. Co....	Berwind.	1034	105.99
N. & W..	55924	1498	6-7	5-30	265	Berwind White C. M. Co.	Berwind.	1007	103.22
N. & W..	53900	218	6-11	6-1	268	Berwind White C. M. Co.	Berwind.	995	101.99
N. & W..	52492	302	6-8	6-4	269	Berwind White C. M. Co.	Berwind.	1003	102.81
N. & W..	11231	364	6-11	6-5	273	Berwind White & Co....	Berwind.	623	63.86
N. & W..	9638	363	6-11	6-5	272	Berwind & White.....	Berwind.	484	49.61
N. & W..	8951	365	6-11	6-5	274	Berwind W. C. M. Co....	Berwind.	488	50.02
N. & W..	47366	366	6-11	6-6	366	Berwind White C. M. Co.	Berwind.	895	91.74
N. & W..	8708	745	6-19	6-13	287	Berwind White.....	Berwind.	499	51.15
N. & W..	8449	746	6-19	6-13	288	Berwind White & Co....	Berwind.	515	52.79
N. & W..	8086	629	6-18	6-8	278	Berwind White.....	Berwind.	488	50.02
N. & W..	12384	747	6-20	6-14	289	Berwind White.....	Berwind.	616	63.44
N. & W..	12047	249	6-20	6-14	292	Berwind White.....	Berwind.	644	66.01
N. & W..	7480	742	6-20	6-9	282	Berwind White.....	Berwind.	490	50.23
N. & W..	51167	568	6-16	6-11	285	Berwind White.....	Berwind.	1017	104.24
N. & W..	54381	744	6-19	6-13	286	Berwind White C. M. Co.	Berwind.	1025	105.06

Car. Initials.	Number.	Pro number.	Date arrival.	Date way-bill.	Way-bill No.	Consignee.	Point of origin.		Am't freight.	Remarks.
N. & W..	7469	566	6-16	6-9	281	Berwind White.....	Berwind.	478	51.05	
N. & W..	7536	630	6-18	6-8	279	Berwind W. C. M. Co....	Berwind.	420	42.05	
N. & W..	45850	1068	6-23	5-23	245	Berwind White.....	Berwind.	889	91.12	
A. V....	378064	598	6-16	6-13	264	Berwind White C. M. Co.	Berwind.	689	70.62	
N. & W..	41792	1064	6-25	6-22	F. 283	Ber. White.....	Berwind.	514	52.69	
H. V....	132	743	6-19	6-11	284½	Berwind White.....	Berwind.	534	54.53	
N. & W..	50519	567	6-16	6-9	284	Berwind White C. M. Co.	Berwind.	1019	104.45	
N. & W..	53221	750	6-22	6-15	293	Berwind	Berwind.	1008	103.32	
N. & W..	53922	811	6-21	6-15	295	Ber. White.....	Berwind.	1007	103.22	
N. & W..	9181	631	6-18	6-8	280	Berwind White C. M. Co.	Berwind.	508	52.07	
N. & W..	11797	565	6-16	6-6	277	Berwind White.....	Berwind.	620	63.55	
122						"Exhibit A."				
N. & W..	8229	748	6-20	6-14	291	Berwind White.....	Berwind.	515	52.74	
N. & W..	55127	816	6-21	6-15	294	B. White.....	Berwind.	996	102.09	
N. & W..	54498	927	6-22	6-20	290	Berwind W.....	Berwind.	993	101.78	

123 ERNEST J. METTLER, recalled as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. While you were in the employ of the Erie Railroad Company at Hammond, Indiana, did you have anything to do with the making up and sending out of the arrival notices?

A. Yes sir.

Q. When would these be sent out, upon the receipt of what data?

A. The receipt of the slip, the card.

Q. And did you ever send out an arrival notice before the car slip had been delivered to you?

A. Not to my knowledge.

Q. Will you look at these two books which I hand you and state whether or not those are books in which you kept memoranda of the sending out of arrival notices and the receipt of the slips accompanying the cars?

A. Yes sir.

Q. Are they in your handwriting?

A. Yes sir.

Q. And are the dates there shown as to the sending out of the notices and the receipt of the slips, correct?

A. Yes sir.

Mr. RAWLINS: I offer these books in evidence.

124 Mr. MARTIN: They are objected to as incompetent, irrelevant and immaterial, and as secondary testimony, primary testimony not having been accounted for; and that the information came to him second hand.

The COURT: Let them be admitted.

Said books so received in evidence were marked Plaintiff's Exhibits B and C respectively, and the portions of them made use of as evidence, are in the words and figures following, to-wit:

To the overruling of said objection and the admission of said books in evidence, the defendant by its counsel then and there duly excepted.

(Here follows table, marked pp. 125-128.)

129 CHARLES M. COOK, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RAWLINS:

Q. What is your name, please?
A. Charles M. Cook.
Q. What is your business, Mr. Cook?
A. Cashier of the Chicago & Erie Railroad Company at Chicago.
Q. How long have you been acting in that capacity?
A. For upwards of a quarter of a century.
Q. Are you familiar with the account for car service charges, demurrage charges against the Berwind White Coal Company, which is set forth in the bill of particulars in this case?
A. I am.
Q. I will ask you whether or not the demurrage on those cars has been paid?
A. It has not.

Cross-examination.

By Mr. MARTIN:

Q. That is you mean it has not been paid to you?
Mr. RAWLINS: Well, you are the treasurer of the Company?
A. Yes sir.

130 Mr. MARTIN:

Q. It has not been paid so far as you know?
A. So far as I know.

* * * * * * *

131 The plaintiff thereupon rested its case.

Whereupon the defendant at the close of the plaintiff's testimony, made and filed in writing the following motion:

132 STATE OF ILLINOIS,
City of Chicago, First District, ss:

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD CO.
vs.
BERWIND-WHITE COAL MINING CO.

Now, at the close of all the evidence offered or received on behalf of the plaintiff, the defendant moves the Court to exclude all of the evidence from the jury and to give to the jury an instruction as follows:

"We, the jury, find the issues for the defendant."

POMEROY & MARTIN,
Attorneys for Defendant.

and with said motion tendered in writing the following instruction:

133 We, the jury, find the issues for the defendant."

134 which motion was overruled and instruction refused by the Court, to which action of the Court in overruling said motion and refusing to give said instruction, the defendant, by its counsel, then and there duly excepted.

135 The defendant thereupon duly rested its case.

Whereupon the defendant at the close of all of the testimony offered by either plaintiff or defendant, made and filed in writing the following motion:

136 STATE OF ILLINOIS,
City of Chicago, First District, ss:

In the Municipal Court of Chicago.

CHICAGO & ERIE RAILROAD CO.
vs.
BERWIND-WHITE COAL MINING CO.

Now at the close of all the evidence offered or received on behalf of both the plaintiff and defendant, the defendant moves the Court to exclude all of the evidence from the jury and to give to the jury an instruction as follows:

"We, the jury, find the issues for the defendant."

POMEROY & MARTIN,
Attorneys for Defendant.

and with said motion tendered in writing the following instruction:

137 "We, the jury, find the issues for the defendant."

138 which motion was overruled and instruction refused by the court, to which action of the Court in overruling said motion and refusing to give said instruction, the defendant, by its counsel, then and there duly excepted.

139 And thereupon the plaintiff made and filed in writing the following motion:

140 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

No. 201,007.

CHICAGO & ERIE RAILROAD COMPANY
vs.
BERWIND-WHITE COAL MINING COMPANY.

Comes now the plaintiff in above entitled cause, by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence offered both on behalf of plaintiff and defendant, and moves the Court to instruct the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $1785.00 and with said motion tenders to the Court a written instruction in the following form:

"The Court instructs the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $1785.00."

with the request that the Court mark said instruction "Given" and read the same to the jury.

CALHOUN, LYFORD & SHEEAN,
Attorneys for Plaintiff.

141 and with said motion tendered the following instruction in writing:

"The Court instructs the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $1785.00."

with the request that the Court mark it "Given" and read the same to the jury, which was done.

142 to the granting of which motion and giving of which instruction, the defendant, by its counsel, then and there excepted.

Which was all the evidence and instructions offered or received on behalf of either party on the trial of said cause.

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by its counsel, then and there moved the Court to set aside the verdict so rendered and grant a new trial of this cause, and filed the following reasons in writing for its motion, to-wit:

143 STATE OF ILLINOIS,
City of Chicago, First District, ss:

In the Municipal Court of Chicago.

201,007.

CHICAGO & ERIE RAILROAD CO.
vs.
BERWIND-WHITE COAL MINING CO.

And now comes the defendant by Pomeroy & Martin its attorneys aforesaid, and moves the Court to set aside the verdict rendered, and to grant a new trial in this cause.

And for grounds of its motion the defendant shows to the Court the following, to wit:

1. The Court admitted improper and incompetent evidence offered on behalf of the plaintiff.

2. The Court improperly refused, at the close of all the evidence offered or received by the plaintiff, to exclude all the evidence offered from the jury, and to give the instruction asked by the defendant to find the issues for the defendant.

3. The Court improperly refused, at the close of all evidence offered or received on behalf of both plaintiff and defendant, to exclude all the evidence from the jury, and to give to the jury the instruction asked by the defendant to find the issues for the defendant.

4. The Court improperly gave to the jury, at the close of all the evidence offered on behalf of both plaintiff and defendant, an instruction to find the issues for the plaintiff, and to assess the plaintiff's damages at the sum of $1785.00.

5. The Court improperly refused to consider, or give effect to a right, or an immunity specially set up and claimed on the trial of said cause by the defendant under a statute of the United States, in this:

That said action was instituted, and the verdict of a jury had, taken and entered, to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois to and into the State of Illinois, without having printed, published and filed, prior to such carriage and attempted collection of such charges, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding, as required by the Act of Congress, commonly known as the Interstate Commerce Act, and all amendments thereof and thereto passed in the years 1887 to 1910.

Wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act, and all amendments thereto, a tariff showing the charges to recover which it instituted said action against the defendant for which the verdict of a jury, by direction of this Honorable Court, has been taken and entered, it was unlawful for the plaintiff to assert or enforce the same, and the

defendant was and is entitled to invoke said Act of Congress
144 above mentioned, in defense to said action and did so invoke the same but the defense of non-compliance by the said plaintiff with said Interstate Commerce Act, so invoked and relied upon by the defendant was improperly decided and determined against the defendant, and no force or effect given to the provisions of the Interstate Commerce Act in that behalf.

6. The verdict is contrary to the law and the evidence in the case.

7. The verdict is contrary to, and in effect nullifies the provisions of said Act of Congress requiring the publishing and posting of tariffs showing the charges made the basis of said action and for which said verdict was rendered, taken and entered by the Court.

POMEROY & MARTIN.
Attorneys for Defendant.

145 & 146 But the Court denied the motion and gave judgment on the verdict against the defendant: to which decision of the Court in denying such motion, the defendant, by its counsel then and there excepted.

Whereupon the defendant by its counsel made a motion to arrest the judgment, but the Court denied the motion to which action of the Court in denying such motion, the defendant by its counsel then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this, its Bill of Exceptions and prays that the same may be signed and sealed by the Judge of this Court pursuant to the statute in such case made; which is done accordingly this 12th day of August, A. D. 1910.

STEPHEN A. FOSTER, *Judge.* [SEAL.]

O. K.

CALHOUN, LYFORD & SHEEAN.
Per E. W. RAWLINS.

The Municipal Court of Chicago. Filed Aug. 23, 1910.
HOMER K. GALPIN, *Clerk.*

147 *Certified Transcript of Record.*

STATE OF ILLINOIS,
County of Cook, ss:

I, Homer K. Galpin, Clerk of The Municipal Court of Chicago, in said County and State, and the keeper of the records and files thereof, in the City, County and State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record in a certain cause (except the bill of exceptions, the original of which is incorporated herein according to law), lately pending in said court, wherein Chicago & Erie Railroad Company — Plaintiff, and Berwind-White Coal Mining Co. Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, aforesaid, this 7th day of September, 1910.

HOMER K. GALPIN, *Clerk.* [SEAL.]

148 Now comes Berwind-White Coal Mining Co., appellant, and says that in the proceedings aforesaid, there is manifest error in this, to-wit:

1. The Court erred in admitting improper and incompetent evidence offered on behalf of the plaintiff.

2. The Court erred in improperly refusing, at the close of all the evidence offered or received by the plaintiff, to exclude all the evidence offered from the jury, and to give the instruction asked by the defendant to find the issues for the defendant.

3. The Court erred in improperly refusing, at the close of all evidence offered or received on behalf of both plaintiff and defendant, to exclude all the evidence from the jury, and to give to the jury the instruction asked by the defendant to find the issues for the defendant.

4. The Court erred in improperly giving to the jury, at the close of all the evidence offered on behalf of both plaintiff and defendant, an instruction to find the issues for the plaintiff, and to assess the plaintiff's damages at the sum of $1785.00.

5. The Court erred in improperly refusing to consider, or give effect to a right, or an immunity specially set up and claimed on the trial of said cause by the defendant under a statute of the United States, in this:

That said action was instituted, and the verdict of a jury had, taken and entered, to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois to and into the State of Illinois, without having printed, published and filed, prior to such carriage and attempted collection of such charges, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding, as required by the Act of Congress, commonly known as the Interstate Commerce Act, and all amendments thereof and thereto passed in the years 1887 and 1910.

Wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act, and all amendments thereof, a tariff showing the charges to recover which it instituted said action against the defendant for which the verdict of a jury, by direction of this Honorable Court, has been taken and entered, it was unlawful for the plaintiff to assert or enforce the same; and the defendant was and is entitled to invoke said Act of Congress above mentioned, in defense to said action and did so invoke the same, but the defense of non-compliance by the said plaintiff with said Interstate Commerce Act, so invoked and relied upon by the defendant was improperly decided and determined against the defendant, and no force or effect given to the provisions of the Interstate Commerce Act in that behalf.

149 & 150 6. The verdict is contrary to the law and the evidence in the case.

7. The verdict is contrary to, and in effect nullifies the provisions of said Act of Congress requiring the publishing and posting of tariffs showing the charges made the basis of said action and for which said verdict was rendered, taken and entered by the Court.

8. The Court erred in overruling defendant's motion for a new trial.

POMEROY & MARTIN,
Attorneys for Appellant.

In the Appellate Court, First District, Illinois.

No. 16955.

CHICAGO & ERIE RAILROAD COMPANY (a Corp.), Appellee,
vs.
BERWIND-WHITE COAL MINING CO. (a Corp.), Appellant.

Appeal from Municipal Court of Chicago.

I, Alfred R. Porter, Clerk of the Appellate Court, within and for the First District of Illinois, and keeper of the record, files and seal thereof, do hereby certify that the Transcript of Record hereto attached and marked "A" is the original transcript of record filed in said Appellate Court, on the third day of October, A. D. 1910, by said appellant.

In testimony whereof, I have hereunto set my hand and seal of said Court, at Chicago, Illinois, this twenty-second day of August, A. D. 1912.

[SEAL.]

ALFRED R. PORTER,
Clerk of the Appellate Court,
First District of Illinois.

"A."

151 *Record from Appellate Court, First District, to Supreme Court.*

Nisi Prius Gen. No. 201007.
Appellate Gen. No. 16955.
Supreme Court Gen. No. —.

CHICAGO & ERIE RAILROAD COMPANY, Appellee,
vs.
BERWIND-WHITE COAL MINING CO., a Corporation, Appellant.

152 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Appellate Court Begun and Held at Chicago on Tuesday, the Fifth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the First District of the State of Illinois.

Present Hon. Jesse A. Baldwin, Presiding Justice.
" " Thomas C. Clark, Justice.
" " Frederick A. Smith, Justice.
Michael Zimmer, Sheriff.
ALFRED R. PORTER, *Clerk.*

Court met pursuant to law.
Court opened by proclamation.

No. 16955.

CHICAGO & ERIE RAILROAD COMPANY, a Corporation, Appellee,
vs.
BERWIND-WHITE COAL MINING COMPANY, a Corporation, Appellant.

Appeal from Municipal Court of Chicago.

Be it remembered, That on the fourth day of October, A. D. 1910, it being one of the days of the October Term, A. D. 1910, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

153 At a Term of the Appellate Court Begun and Held at Chicago on Tuesday, the Fourth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the First District of the State of Illinois.

Present Hon. Henry V. Freeman, Presiding Justice.
" " Frank Baker, Justice.
" " Jesse Holdom, Justice.
Christopher Strassheim, Sheriff.
ALFRED R. PORTER, *Clerk*.

Court met pursuant to law.
Court opened by proclamation.

And afterwards, on the fifth day of October A. D. 1910, the following proceedings were had and entered of record in said cause, to-wit:—

154 In the Matter of the Assignment of Cases to the Branch Appellate Court.

On the Court's own motion it is ordered that the following numbered cases on the October Term Calendar, A. D. 1910, of said Court, be and they are hereby assigned to the Branch Appellate Court for hearing and determination, to-wit:—415—16955, et al.

And afterwards, on the 17th day of January A. D. 1911, the following proceedings were had and entered of record in said cause, to-wit:—

155–159 TUESDAY, *January* 17, A. *D.* 1911.

Present: Hon. Julian W. Mack, Presiding Justice.
" " Frederick A. Smith, Justice.
" " Jesse A. Baldwin, "
Michael Zimmer, Sheriff.
ALFRED R. PORTER, *Clerk*.

Court met pursuant to an adjournment.

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415—16955.

CHICAGO & ERIE RAILROAD COMPANY, Appellee,
vs.
BERWIND-WHITE COAL MINING CO., Appellant.

Appeal from Municipal Court of Chicago.

Mr. Justice F. A. SMITH delivered the opinion of the court.

This action was brought by the Chicago and Erie Railroad Company, appellee, in the Municipal Court of Chicago, against the Berwind-White Coal Mining Company, appellant, to recover demurrage or car service charges on 148 carloads of coal, the charges accruing while the cars were being held in appellee's yards at Hammond, Indiana, awaiting consigning orders.

The cars in question were shipped by appellant from Berwind, West Virginia, consigned to itself flat at Chicago. The shipments cover a period from May 10, 1906, to December 7, 1906. Appellant had no tracks or storage yards in Chicago, but had an office in the Fisher Building in that city. Appellee's holding yards for carload freight billed flat to Chicago are at Hammond, Indiana, and all cars so billed are held at that point for re-consignment. It has never been the practice or custom to bring cars consigned flat to Chicago into the city, as Hammond is the regular hold-out yard for Chicago for appellee, and if brought into the city they would only have to be hauled out again through the Belt Line, or some other road, on re-consignment orders.

This method and practice of handling carload shipments had been in vogue for twenty years or more. From time to time as the cars arrived at Hammond, appellee sent to appellant by messenger
161 arrival notices. These notices were delivered at appellant's office in Chicago, and appellant in turn mailed to appellee's agent at Hammond consigning orders directing appellee where to send the coal. This was done in the case of each and every car involved in this action. All of the original re-consigning orders are attached to the record and with but one or two exceptions there is typewritten at the bottom of each of those re-consigning orders the words, "We pay car service", or the words "Collect car service at this office."

During the time in question demurrage charges at the rate of one dollar per day, after deducting the free time and holidays, accrued to the amount of $1,785.

The appellant offered no evidence in the court below and the court directed the jury to find the issues for the plaintiff, and to assess appellee's damages at the sum of $1,785, there being no dispute as to the amount, and judgment was entered on the verdict.

The contention of appellant is that there was no legal tariff in force covering the demurrage and therefore it could not legally be assessed, and that even if there had been a tariff the carrier could not assess demurrage until the shipments had reached their destination.

It is also contended on behalf of the appellant that there were errors committed in the admission of evidence on behalf of appellee.

No claim whatever is made by appellant that the amount of demurrage charges in question, at the rate of one dollar per day, did not actually accrue while the cars were being held in the storage yards at Hammond awaiting re-consignment, or that the charges made were not reasonable, or the customary and usual ones, so that no question as to the correctness or reasonableness of the charges is before the court. (Schumacher v. C. & N. W. Ry. Co., 207 Ill. 214.)

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The claim of appellant is that appellee was not entitled to make any charge at all for demurrage, for the reasons, 1st, that appellee did not file with the Interstate Commerce Commission tariff schedules properly setting out the charges; and, 2nd, because appellee did not make a proper delivery of the cars.

The record shows that sixty-eight of the cars in question were shipped and delivered prior to August 29, 1906, the time the Hepburn Act went into force; and appellee's right to collect the $1163, assessed on those cars is in no way affected by the tariffs, as under the act in force at that time the failure to file tariffs simply rendered the carrier subject to a penalty, and in no way affected its right to make charges.

Appellee's contention on the other hand is that it had complied with the rules of the Interstate Commerce Commission, and it is therefore immaterial to discuss the tariffs in reference to their applicability to any particular part of the shipments. The evidence shows that the shipments were made and delivered in 1906, part of them just prior to and a part just after the Hepburn Act went into effect.

By the Interstate and Hepburn acts the Commission may determine and direct the form in which schedules shall be prepared and arranged, and may change the form from time to time as it shall find expedient. Appellee contends, and we think with reason, that the rules and regulations on file with the Commission at the time the shipments were made, were a sufficient compliance with the rules to authorize the collection of the charges in suit, even under the present requirements of the Commission.

For some time prior to the time in question there was in existence an association composed of the various railroads entering Chicago, known as the "Chicago Car Service Association," and they had promulgated certain rules covering demurrage in the territory bounded by Lake Michigan on the east, Waukegan on the north, thence following and including the line of the Elgin, Joliet & Eastern Railway Company, to and including Griffith, Indiana, thence north to Edgemoor, Indiana, on the shore of Lake Michigan. This association published a book of rules entitled "Car Service and Storage Rules," a copy of which is attached to the record. On page 3 of that book appears the names of the various railroads comprising the association, including that of appellee. In this book was set forth in detail the rules to be followed by the railroad in assessing demurrage on cars brought within the territory of the association,

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with reference to free time allowing for loading, unloading and re-consignment.

Under date of August 29, 1904, appellee filed a copy of those rules with the Interstate Commerce Commission. It is true that in the book no specific mention is made of the amount of the charge, but day or two later, it filed with the Interstate Commerce Commission a statement referring to the book, and in part as follows:

"In connection therewith beg to advise that our rates will be: Car service, one dollar ($1.) per day or fraction thereof."

Later, under date of October 18, 1905, it filed with the Commission an amendment to the rule, changing the free time from seven to five days, and later certain other amendments were filed which are not material to the present case. These documents, as the record shows, are all printed in plain, legible type, and the rules
164 and regulations therein contained are clearly set forth and can be easily and readily understood, and are such that any one desiring to find out from the documents that are on file with the Commission what the demurrage charges in the territory of the Chicago Car Service Association were, could readily have done so.

Counsel for appellant make numerous criticisms of the publications. Their first criticism is as to the style and form of the documents themselves. Those, however, are matters entirely for the Commerce Commission to determine. It was not for the trial court, and is not for this court to determine or fix the particular form or style of tariffs, or the size of the type in which the tariffs are to be printed. The provision of the act touching this point is:

"The Commission may determine and direct the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time, as shall be found expedient."

It is further urged by counsel for appellant that the demurrage rules and charges filed do not refer specifically to any tariffs which give the transportation rates. In our opinion demurrage charges have nothing to do with transportation rates. In Suffern, Hunt & Co. v. I. C. & W., 7 I. C. C. R. 272, the general rule is laid down as follows:

"Whether a rule or regulation concerning transportation can lawfully be established by the issuance of a schedule or document which neither prescribes rates, fares or charges, nor refers to any rate or fare schedule, depends upon the nature of the rule or regulation. If rules or regulations in any wise change, affect or determine any part of the aggregate of such rates, fares and charges, they must be stated on the schedule of such rates, fares and charges."

We think it is clear that such a rule would have no application to demurrage charges, as they are no part of the transportation charge. Before a shipment is made it cannot possibly be known what the demurrage charges will amount to, or whether there will be any
165 at all. If the cars are unloaded or re-consigned within free time, there will be none. In every case the question of whether or ont there will be a car service depends upon the consignee or owner, or upon conditions which cannot possibly be known in ad-

vance. Demurrage charges are no part of and are separate and distinct from transportation charges, and do not arise, if at all, until the transportation has ended. Furthermore, it has been specifically held that the fact that the demurrage rules and tariffs are filed separately, does not deprive the carrier of the right to make a charge. (Cudahy Packing Co. v. C. & N. W. Ry. Co., 12 I. C. C. R., 446.)

In this case the demurrage rules and charges were duly filed with the Commission.

It is further objected that the evidence does not show compliance with the rules of the Interstate Commerce Commission, in that it does not show that the rules in question were kept posted in two public places in its depot. In Texas & Pacific Ry. Co. v. Cisco Oil Mill, 204 U. S., 449, it was held that the publication of the rules was not a condition precedent to the establishment and putting in force of tariff rates, but that the rates were established when a schedule thereof was filed with the Interstate Commerce Commission, and that the other provisions in the act had for their objects merely the affording of special facilities to the public for ascertaining the rates actually in force. We think the contention that the appellee had failed to comply with the rules of the Interstate Commerce Commission with reference to posting the tariff in its depots is without merit. (Texas & P. R. R. Co. v. Abilene Oil Co., 204 U. S., 426; Erie R. R. Co. v. Wanaque Lumber Co., 69 Atlantic Rep., 168.)

It is not claimed or contended that the demurrage charges
166 in question did not accrue, or that they were not the ordinary and customary charges, or that they were not reasonable. We think upon the evidence, that appellant not only knew that it was required to pay car service, but it agreed to do so. The right of the carrier to make car service charges is a common law right and not one which is given by statute. The right existed before the Interstate Commerce Commission was created. The mere fact that a carrier has failed to file tariffs or has filed defective tariffs, does not, in law, permit a consignee or owner to escape the payment of the ordinary and usual charges made. If the appellee has failed to file tariffs it will be dealt with by the Interstate Commerce Commission on proper application, but that has no legal bearing upon the question presented in this record.

It is contended, on behalf of appellant, that the court erred in admitting in evidence certain records which were kept by appellee at its office at Hammond. The objection made is that they were secondary evidence, and not the best evidence. In our opinion the objection is not well taken. We think the evidence was properly admitted.

As to the contention that appellee was not entitled to make the car service charges in question because the cars were held at Hammond awaiting the re-consigning orders, and were not actually brought within the city limits of the city of Chicago, we think very little need be said. The undisputed evidence shows that the yards at Hammond are the regular Chicago yards of appellee for holding cars which are billed that to Chicago. Hammond was the customary and convenient place for holding cars and had been upwards of twenty

years. The record shows that appellant had no storage yards o
tracks in the city of Chicago and consequently could not tak
167 care of the cars had they been brought into the city. W
think the contention of appellant upon this point cannot b
sustained. (Woolner Distilling Co. v. Peoria & Eastern Ry. Co
136 Ill. App. 479.)

We find no substantial error in the record and the judgment is ac
cordingly affirmed.

Affirmed.

168 And afterwards, on the same day, to-wit, the 4th day o
June, A. D. 1912, the following proceedings were had and
entered of record in said cause, to-wit:

169 No. 16955.

CHICAGO & ERIE RAILROAD COMPANY, Appellee,
vs.
BERWIND-WHITE COAL MINING CO., a Corporation, Appellant.

Appeal from Cook Municipal Court of Chicago.

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective; and that in the record there is no Error: Therefore, it is considered by the Court that the judgment aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for Error. And it is further considered by the Court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the twenty-fifth day of June A. D. 1912, the following proceedings were had and entered of record in said cause to-wit:

170 16955.

CHICAGO & ERIE RAILROAD COMPANY, Appellee,
vs.
BERWIND-WHITE COAL MINING CO., Appellant.

Appeal from Municipal Court of Chicago.

This day came appellant by its counsel, and moved the Court that the issuance of the mandate herein be stayed until the time for the

filing of a petition in the Supreme Court of Illinois to review the judgment of this Court in said cause shall have expired without any such petition for said writ having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards a certain transcript of the proceedings of said Appellate Court in said cause was prepared by the clerk of said Appellate Court, for use in said Supreme Court of Illinois; which said transcript of record, duly certified was delivered to Pomeroy & Martin, attorneys for appellant, on the 23rd day of July, A. D. 1912.

171 And afterwards on the twenty-second day of August, A. D. 1912, a certain certificate from the Supreme Court of Illinois was filed in said Appellate Court in said cause; which said certificate is in the words and figures following, to-wit:

172 STATE OF ILLINOIS,
Supreme Court, ss:

To the Clerk of the Appellate Court of the First District, Greeting:

This is to certify that the transcript of the record of the Appellate Court of the First District in a certain cause entitled Berwind-White Coal Mining Co., Petitioner vs. Chicago & Erie R. R. Co. App. No. 16955, Respondents, together with the petition for a writ of certiorari, and also an abstract of the record of proceedings in said cause, have been filed in this court.

Witness, my hand and seal of said Supreme Court, at Springfield, this 21st day of August, A. D. 1912.

[Seal of Supreme Court of Illinois.]

J. McCAN DAVIS
Clerk Supreme Court.

173 And thereupon on the same day, to-wit, the 22nd day of August, A. D. 1912, the original transcript of the record of the proceedings of the Municipal Court of Chicago in said cause, heretofore filed in said cause in said Appellate Court on the third day of October, A. D. 1910, by said appellant, was duly certified by the Clerk of said Appellate Court and transmitted to the Supreme Court of Illinois.

174 & 175 And afterwards on the 24th day of August, A. D. 1912, a certain receipt of the Clerk of the Supreme Court of Illinois was filed in said cause in said Appellate Court; which said receipt is in the words and figures following, to-wit:

* * * * * * *

176 And afterwards, on the 31st day of October, A. D. 1912, the original transcript of the record of proceedings of the Municipal Court of Chicago in said cause, heretofore filed in said cause in said Appellate Court on the 3rd day of October, A. D. 1910, by said appellant, and afterwards transmitted to the Supreme Court of Illinois on the 22nd day of August, A. D. 1912, was returned to said Appellate Court from said Supreme Court of Illinois and placed in the files of said cause in said Appellate Court.

177–192 And afterwards on the 14th day of November, A. D. 1912, a certain Petition for Writ of Error from the Supreme Court of the United States was filed in said cause; which said petition is in the words and figures following, to-wit:

* * * * * * *

193 In the Appellate Court of Illinois, First District.

CHICAGO & ERIE RAILROAD CO., Appellee,
vs.
BERWIND-WHITE COAL MINING CO., Appellant

To Messrs. Calhoun, Lyford & Sheean, Attorneys for Appellee:

You are hereby notified that we will file in the office of the Clerk of the Appellate Court of Illinois, First District, a Praecipe for record in above entitled cause to be used in the Supreme Court of the United States, and upon petition for a Writ of Error in said cause, a copy of which is herewith handed you.

Yours, etc., POMEROY & MARTIN,
Attorneys for Appellant.

Received copy of the above and the praecipe therein mentioned, this 29th day of November, A. D. 1912.

(Signed) CALHOUN, LYFORD & SHEEAN,
Attorneys for Appellee.

[Endorsed:] Copy. Filed Appellate Court, Dec. 2, 1912. Alfred R. Porter, Clerk.

194 And afterwards on the twelfth day of December, A. D. 1912, there was filed in the office of the Clerk of said Appellate Court a certain Petition for a writ of error from the Supreme Court of the United States in said cause; which said petition with the order of the Hon. Horace H. Lurton, Justice of the Supreme Court of the United States thereon endorsed, together with the original assignment of errors thereto attached is incorporated herein and is as follows:

195 UNITED STATES OF AMERICA, ss:

In the Supreme Court of the United States.

BERWIND-WHITE COAL MINING CO., Plaintiff in Error,
vs.
CHICAGO & ERIE RAILROAD CO., Defendant in Error.

Petition for Writ of Error to the Appellate Court of Illinois, First District.

To the Supreme Court of the United States and the Honorable Judges thereof:

Now comes Berwind-White Coal Mining Co., a corporation, the above named plaintiff in error, by its attorneys, Edward D. Ponemoy and Henry T. Martin, and complains and alleges that it is a citizen of the United States of America; that in the above entitled matter on the 4th day of June A. D. 1912, judgment was rendered against your petitioner by the Appellate Court of Illinois in and for the First District, that being the highest court of law or equity in the said State of Illinois to which an appeal can be taken or writ of error sued out, wherein it was adjudged that prior to August 29, 1906, the failure by a common carrier to file, publish, post or keep open to public inspection tariffs provided for by the Interstate Commerce Act covering shipments from one state to another, merely subjected the carrier to a penalty and in no way affected the right of the carrier to make charges for demurrage upon interstate shipments. That the filing of a certain pamphlet issued by the Chicago Car Service Association, an association of railroads of which the Chicago & Erie Railroad Co. was a member, and filed by Chicago & Erie Railroad Co. stating that demurrage would be charged upon interstate shipments, but not specifying the amount of said charge, which pamphlet was not shown to have been either published, distributed, posted, or kept open to public inspection, supplemented by a
196 letter of a later date written by the Chicago & Erie Railroad Co. to the secretary of the Interstate Commerce Commission, advising that demurrage charges of the Chicago & Erie Railroad Co. would be One Dollar per day, which said letter is not shown to have been published, posted, nor kept open to public inspection, and the filing of certain circulars subsequent thereto changing the amount of free time, but fixing no charge, which circulars were not shown to have been published, distributed or kept open to public inspection, created a legal tariff in compliance with the terms of the Interstate Commerce Act with reference to the filing, publishing, and posting of tariffs, and was a sufficient basis for demurrage charges upon interstate shipments. That certain reconsigning orders upon which were endorsed "We pay car service" or "Collect car service at this office" amounted to a valid and binding agreement to pay car service charges upon interstate shipments whether any tariff had been filed with the Interstate Commerce Commission fixing the amount of said charges or not. That the fact that the demurrage charges so created

to be in force in Chicago were not shown to have been referred to in the tariffs under which interstate shipments were made, was immaterial. That shipments were made from Berwind, West Virginia, to Chicago, Illinois, could be stopped at Hammond, Indiana, (a point en route,) and demurrage charged for their detention at Hammond, when there was no tariff on file with the Interstate Commerce Commission specifically permitting such charge. That the right to charge demurrage upon interstate shipments is a common law right and not dependent upon a tariff filed, published and posted pursuant to the Interstate Commerce Act, as provided by Section 6 thereof. That demurrage is no part of the transportation under the Interstate Commerce Act, and that all of said holdings are not in conflict with Section 6 of the Interstate Commerce Act, either as it existed before August 29, 1906, or thereafter, in that they failed to con-
197 sider or give effect to a right or an immunity specifically set up and claimed by said Berwind-White Coal Mining Co. under the Interstate Commerce Act, and that said findings did not nullify the provisions of the Interstate Commerce Act as set forth in Section 6 thereof, requiring the filing, publishing, posting, distribution and keeping open to public inspection, of tariffs, which right and immunity was specifically set up and claimed in the Municipal Court of Chicago where the case was originally tried, in the Appellate Court of Illinois, First District, and in a petition afterward filed for a writ of certiorari to the Supreme Court of Illinois, all of which appears in the record, opinion and final judgment of the Appellate Court.

That a judgment for the sum of Seventeen Hundred Eighty-five ($1785) Dollars was rendered against Berwind-White Coal Mining Co. whereby manifest error has happened to the great damage of Berwind-White Coal Mining Co.

That the suit in question was instituted by the Chicago & Erie Railroad Co. to recover from Berwind-White Coal Mining Co. demurrage upon 148 cars of coal shipped during a period covering from May 10, 1906, to December 7, 1906, by the Berwind-White Coal Mining Co. from Berwind, West Virginia, to itself at Chicago, Illinois, all of which were interstate shipments and billed direct to Chicago, but which were held at Hammond, Indiana, a point en-route, at which place the demurrage charges in dispute were assessed. The defendant set up both in the trial court and upon appeal, and also in its petition for certiorari to the Supreme Court of Illinois that the Chicago & Erie Railroad Co. had not at the time when said demurrage was supposed to have accrued, any tariff on file with the Interstate Commerce Commission permitting demurrage to be charged upon the shipments in question, and that no tariff permitting said charges had been filed, published, posted or kept open to public inspection as required by Section 6 of the Interstate
198 Commerce Act, authorizing the collection of such demurrage at Chicago, Illinois, and that plaintiff had not filed at said time with said Interstate Commerce Commission any tariff authorizing collection of demurrage upon said shipments at Hammond, Indiana, upon interstate shipments billed to Chicago, which were

stopped in transit at said Hammond, Indiana, and also that no demurrage tariff covering demurrage in Chicago was shown to have been referred to in the tariff upon which the various shipments were made.

That by the terms of Section 6 of the Interstate Commerce Act, as it existed prior to August 29, 1906, it was provided:

"That every common carrier subject to the provisions of this Act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise, change, effect or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station or office of such carrier, where passengers or freight respectively are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. * * *

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this Section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property or for any services in connection therewith than is specified in such published schedule of rates, fares and charges, as may at the time be in force."

And under the terms of Section 6 of said Act as it existed subsequent thereto, it was provided:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act, and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force and shall
199 also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, effect, or determine any part or the aggregate of such aforesaid rates, fares, and charges or the value of the service rendered to the passenger, shipper, or consignee, and such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such

carrier where passengers or freight respectively are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. * * * No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

That under the laws of the State of Illinois, Section 121, Chapter 110, as amended and in force July 1, 1909, it is provided

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: * * *

(2) In any such case as is hereinbefore made final in said Appellate Court, it shall be competent for the Supreme Court to require by certiorari or otherwise any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court; provided, however, that in actions ex contractu (exclusive of actions involving a penalty) and in all cases sounding in damages, the judgment exclusive of costs shall be more than One Thousand Dollars ($1000); and provided, also, that application under this Act to the Supreme Court to cause it to require a case to be certified to it for its review and determination shall be made on or before twenty (20) days before the 1st day of the succeeding term of said Supreme Court."

and that the causes in which appeals and writs of error are specifically required by the constitution of the State of Illinois are (Section 11, Article 6, Constitution of 1870).

"In all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved."

which does not include this cause.

That on the 22nd day of August A. D. 1912, a petition for
200 certiorari was filed by Berwind-White Coal Mining Co. in the Supreme Court of Illinois directed to its then next term beginning October 1, 1912, which was more than twenty (20) days prior to the commencement of said term, praying that the said Supreme Court take cognizance of said cause, which petition was on the 8th day of October A. D. 1912, denied by said court, whereby the judgment of the Appellate Court of Illinois was made final.

Wherein and whereby there was drawn in question the validity of a treaty or statute of, or any authority exercised under, the United

States, and the decision was against their validity; or there was drawn in question the validity of a statute of, or an authority exercised under, a state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or there was drawn in question a title, right, privilege or immunity specifically set up and claimed under the constitution or a treaty or a statute of the United States, and the decision was against the title, right, privilege or immunity specifically set up or claimed under such constitution, treaty, statute, commission or authority.

Wherefore, Berwind-White Coal Mining Co. prays for the allowance of a writ of error from the Supreme Court of the United States to the Appellate Court of Illinois in and for the First District and the judges thereof to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and the judgment reversed, and your petitioner will ever pray.

BERWIND-WHITE COAL MINING CO., *Petitioner.*
By EDWARD D. POMEROY
By HENRY T. MARTIN,
Its Attorneys.

201 The writ of error as prayed for in the foregoing petition is hereby allowed this 10th day of December, 1912, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Three Thousand Dollars *Dollars.*

Dated this 10th day of December A. D. 1912.

HORACE H. LURTON,
Associate Justice United States Supreme Court.

202 Supreme Court of the United States

BERWIND-WHITE COAL MINING CO., Plaintiff in Error,
vs.
CHICAGO & ERIE RAILROAD CO., Defendant in Error.

Assignment of Errors.

And now comes Berwind-White Coal Mining Co., plaintiff in error, and makes and files this, its assignment of errors.

I. The Appellate Court of Illinois erred in not reversing the case because there was no evidence to support the judgment.

II. The Appellate Court of Illinois erred in not reversing the case because in the Municipal Court of Chicago a peremptory instruction was given to find the issues for the plaintiff.

III. The Appellate Court of Illinois erred and the Trial Court erred in improperly refusing to consider or give effect to a right or immunity specifically set up and claimed on the trial of said cause, and upon the appeal thereof in the Appellate Court by plaintiff in

error under a statute of the United States in this: That said action was instituted and verdict of a jury had, taken, and entered to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois to and into the State of Illinois without having filed, printed, published, or kept open to public inspection, prior to such carriage, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding, as required by the act of Congress commonly known as the Interstate Commerce Act, and all amendments thereof and thereto, passed in the years 1887 to 1910 wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act and all amendments thereto, a tariff
203 showing the charges to recover which it instituted its action against the defendant, for which the verdict of a jury by direction of the Trial Court was taken and entered, it was unlawful for the plaintiff to assert or enforce the same and the defendant was and is entitled to invoke said Act of Congress above mentioned in defense to said action and did so invoke the same, but the defense of non-compliance by said plaintiff with the Interstate Commerce Act so invoked and relied upon by the defendant, was improperly decided and determined against the defendant and no force or effect given to the provisions of the Interstate Commerce Act in that behalf.

IV. The Appellate Court of Illinois erred in not holding that the verdict was contrary to and in effect nullified the provisions of the Interstate Commerce Act requiring the publishing and posting of tariffs showing the charges made the basis of said action and for which the verdict was rendered, taken, and entered by the Court.

V. The Appellate Court erred in not holding that the Trial Court erred in overruling defendant's motion for new trial.

VI. The Appellate Court erred in holding that an agreement to pay demurrage charges or fixing the amount thereof upon interstate shipments, when not fixed by a tariff, is binding upon the parties and not contrary to the Interstate Commerce Act.

VII. The Appellate Court erred in holding that failure to file tariffs or failure to comply with the Interstate Commerce Act, which was in effect prior to August 29, 1906, did not effect the right to make a demurrage charge.

VIII. The Appellate Court erred in holding that the evidence shows a compliance with the Interstate Commerce Act in the filing of tariffs in this case.

IX. The Appellate Court erred in holding that demurrage is no part of the transportation under the Interstate Commerce Act.

X. The Appellate Court erred in holding that the right to
204 charge demurrage on interstate shipments is a common law right, which right was not and is not affected by the Interstate Commerce Act and that demurrage may be recovered where a carrier has filed no tariffs or has filed defective tariffs which did not comply with the Interstate Commerce Act.

XI. The Appellate Court erred in holding that a delivery of the cars of coal in question at Hammond, Indiana, was a delivery to

Chicago, for the purpose of assessing demurrage where there was no specific tariff authority therefor, pursuant to the terms of the Interstate Commerce Act.

XII. The Appellate Court erred in holding that demurrage could be charged upon cars in question before they reached their destination, without a specific tariff authority therefore.

EDWARD D. POMEROY,
HENRY T. MARTIN
Attorneys for Berwind-White Coal Mining Co.

205 [Endorsed:] In the Supreme Court of the United States. Berwind-White Coal Mining Co., Plaintiff in Error, vs. Chicago & Erie Railroad Co., Defendant in Error. Petition for Writ of Error. Appellate Court. Filed Dec. 12, 1912. Alfred R. Porter Clerk. Edward D. Pomeroy and Henry T. Martin, Attorneys for Plaintiff in Error.

206 And thereupon on the same day, to-wit, the twelfth day of December, A. D. 1912, there was filed in the office of the Clerk of said Appellate Court a certain bond in said cause, by said Berwind-White Coal Mining Company; which said bond is in the words and figures following, to-wit:

207 Copy.

Know all men by these presents that we, Berwind-White Coal Mining Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Chicago & Erie Railroad Company in the sum of Three Thousand Dollars ($3000) to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of December A. D. 1912.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States, to reverse the judgment rendered in a cause entitled Chicago & Erie Railroad Company, defendant in error, versus Berwind-White Coal Mining Company, plaintiff in error, in the Appellate Court of Illinois, First District.

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

(Signed) BERWIND WHITE COAL MG CO. [SEAL.]
By H. C. MIDDLETON, *President.*

[Berwind-White Coal Mining Co. Seal.]

(Signed) FIDELITY AND DEPOSIT COMPANY OF MARYLAND. [SEAL.]
By WILLIAM G. KRESS,
Agent and Attorney in Fact.

[Fidelity & Deposit Co. Seal.]

208 Copy.

STATE OF PENNA.,
County of Phila., ss:

On this 10th day of December, before me personally appear Berwind-White Coal Mining Co., by its duly authorized officer, to known to be the person described in and who executed the foregoi bond, and acknowledged that he executed the same as his free a voluntary act and deed and as the voluntary act and deed of B wind-White Coal Mining Co.

(Signed) SALOME B. WEAVER. [SEAL.]
Notary Public in and for the County of Phila-
delphia and State of Pennsylvania.

My commission expires Feb'y 27, 1913.

I hereby approve the foregoing bond and sureties, this 10th d of December A. D. 1912.

(Signed) HORACE H. LURTON,
Associate Justice U. S. Supreme Court.

209 And thereupon on the same day, to-wit, the twelfth day December, A. D. 1912, a certain citation and proof of servi thereof was filed in said cause in said Appellate Court by said appe lant; which said citation is incorporated herein and is as follows:

210 UNITED STATES OF AMERICA, *ss:*

To Chicago & Erie Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Su preme Court of the United States, at Washington, within thirty day from the date hereof, pursuant to a writ of error, filed in the Clerk Office of the Appellate Court of the State of Illinois, First Distric wherein Berwind-White Coal Mining Company is plaintiff in erro and you are defendant in error, to show cause, if any there be, wh the judgment rendered against the said plaintiff in error as in th said writ of error mentioned, should not be corrected, and wh speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice o the Supreme Court of the United States, this tenth day of Decem ber, in the year of our Lord one thousand nine hundred and twelv

HORACE H. LURTON,
Associate Justice of the Supreme Court
of the United States.

On this 12th day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared before me, the subscriber, Henry T. Martin and makes oath that he delivered a true copy of the within citation to Messrs. Calhoun, Lyford & Sheean attorneys for Chicago & Erie Railroad Company.

HENRY T. MARTIN.

Sworn to and subscribed the 12th day of December, A. D. 1912.

[Seal Roy S. Gaskill, Notary Public, Cook County, Ill.]

ROY S. GASKILL,
Notary Public, Cook County, Illinois.

My commission expires Jan'y 4, 1914.

211-214 And thereupon on the same day, to-wit, the twelfth day of December, A. D. 1912, there was filed in the office of the Clerk of said Appellate Court a certain praecipe for a transcript of record in said cause; which said praecipe together with proof of service thereof is in the words and figures following, to-wit:

* * * * * * *

215 And thereupon on the same day, to-wit, the twelfth day of December, A. D. 1912, a certain writ of error from the Supreme Court of the United States was filed in the office of the Clerk of said Appellate Court, in said cause, which said writ with the return of the Clerk of said Appellate Court thereon endorsed, is hereto attached, and is as follows:

216 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Appellate Court of the State of Illinois, First District, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Appellate Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Berwind-White Coal Mining Company and Chicago & Erie Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-
217 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Berwind-White Coal Mining Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

STATE OF ILLINOIS,
Appellate Court, First District, ss:

I, Alfred R. Porter, Clerk of the Appellate Court within and for the First District of the State of Illinois, do hereby certify that the foregoing pages consisting of the cover and pages 1 to 150 inclusive, are a true, full and complete copy of a certain duly authenticated transcript of the record of proceedings of the Municipal Court of Chicago, filed in said Appellate Court on the third day of October, A. D. 1910, by said appellant in a certain cause entitled Chicago & Erie Railroad Company, a corporation, Appellee, vs. Berwind-White Coal Mining Company, a corporation, Appellant.

I further certify that the foregoing pages numbered 151 to 217 inclusive are a true, full and complete transcript of the final order and judgment and all other proceedings and opinion of the said Appellate Court in said cause of record in my office to date December 12th, A. D. 1912, inclusive.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Appellate Court, at Chicago, in said State, this third day of January, A. D. 1913.

[Seal Appellate Court of the First District, State of Illinois, July 1, 1877.]

ALFRED R. PORTER,
Clerk of the Appellate Court, First District, Illinois.

Costs of Suit.

Appellant's costs, $21.40, paid by Berwind-White Coal Mining Co.
Appellee's costs, $5.00, paid by Chicago & Erie Railroad Co.
Costs of transcript, $122.45, paid by Berwind-White Coal Mining Co.

ALFRED R. PORTER, *Clerk.*

218 And afterwards on the second day of January, A. D 1913, there was filed in the office of the Clerk of said Appellate Court, by said appellant, a certain duly exemplified transcript of the record of proceedings of the Supreme Court of the State of Illinois, in said cause; which said transcript of record is in the words and figures following, to-wit:

219 At a Supreme Court Begun and Held at Springfield on Tuesday, the First Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve, Within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin M. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered that to-wit on the Twenty-First day of August, A. D. 1912, the same being one of the days in vacation before the term of Court aforesaid, a certain record from the Appellate Court First District Abstract of the record and petition for Certiorari was filed in the office of the Clerk of the Supreme Court. And afterwards, to-wit, on the Twenty-third day of August A. D. 1912 the record from the Municipal Court of Chicago was filed in the office of the Clerk of the Supreme Court.

220–227 8409. Record from Appellate Court, First District to Supreme Court. Nisi Prius Gen. No. 201,007. Appellate Gen. No. 16955. Supreme Court Gen. No. — Chicago & Erie Railroad Co. vs. Berwind White Coal Mining Co. Filed Aug. 21, 1912. J. McCan Davis, Clerk of Supreme Court.

228 *Assignment of Errors.*

Now comes Berwind-White Coal Mining Co., petitioner, by Pomeroy & Martin, its attorneys, and assigns errors as follows:

1. The Appellate Court erred in affirming the judgment of the Municipal Court of Chicago.

2. The Appellate Court erred in not reversing the cause with a finding of facts.

3. The verdict of the jury and the judgment of the Appellate Court and the Municipal Court of Chicago are contrary to the law and the evidence.

4. The Appellate Court erred in not holding that the trial court admitted improper and incompetent evidence offered on behalf of the plaintiff in the trial court.

5. The Appellate Court erred in not holding that the trial court erred in improperly refusing at the close of all the evidence offered of received by plaintiff to exclude all the evidence offered from the jury and to give the instruction asked by the defendant to find the issues for the defendant.

6. The Appellate Court erred in not holding that the trial court erred in improperly refusing, at the close of all evidence offered or received on behalf of plaintiff and defendant, to exclude all the evidence from the jury and to give to the jury the instruction asked by the defendant to find the issues for the defendant.

7. The Appellate Court erred in not holding that the trial court erred in improperly giving to the jury at the close of all the evidence offered on behalf of plaintiff and defendant, an instruction to find the issues for the plaintiff and to assess the plaintiff's damages at $1785.00.

229 8. The Appellate Court erred in not holding that the trial court erred in improperly refusing to consider or give effect to a right or an immunity specifically set up and claimed on the trial of said cause by the defendant under a statute of the United States in this:

That said action was instituted and the verdict of a jury had, taken and entered, to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois to and into the State of Illinois, without having printed, published and filed, prior to such carriage, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding as required by the Act of Congress, commonly known as the Interstate Commerce Act, and all amendments thereof and thereto passed in the years 1887 to 1910.

Wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act, and all amendments thereto, a tariff showing the charges to recover which it institutes said action against the defendant for which the verdict of a jury, by direction of Court, has been taken and entered, it was unlawful for the plaintiff to assert or enforce the same; and the defendant was and is entitled to invoke said Act of Congress above mentioned, in defense to said action and did so invoke the same but the defense of non-compliance by the said plaintiff with the said Interstate Commerce act, so invoked and relied upon by the defendant was improperly decided and determined against the defendant, and no force or effect given to the provisions of the Interstate Commerce act in that behalf.

9. The Appellate Court erred in not holding that the ver-
230 dict was contrary to and in effect nullifies the provisions of said Interstate Commerce Act requiring the publishing and posting of tariffs showing the charges made the basis of said action and for which the verdict was rendered, taken and entered by the Court.

10. The Appellate Court erred in not holding that the trial court erred in overruling defendant's motion for new trial.

11. The Appellate Court erred in holding that an agreement to pay demurrage charges or to fix the amount thereof upon interstate shipments when not fixed by a tariff, is binding between the parties.

12. The Appellate Court erred in holding that failure to file tariffs and the failure to comply with the Interstate Commerce Act prior to August 29, 1906, did not effect the right to make a demurrage charge.

13. The Appellate Court erred in holding that the evidence shows a compliance with the Interstate Commerce Act in the filing of tariffs in this case.

14. The Appellate Court erred in holding that demurrage is no part of the transportation under the Interstate Commerce Act.

15. The Appellate Court erred in holding that the right to charge demurrage on interstate shipments is a common law right which right was not affected by the Interstate Commerce Act, and that demurrage may be recovered whether the carrier has failed to file tariffs or filed defective tariffs which do not comply with the Interstate Commerce Law.

16. The Appellate Court erred in holding that a delivery of the cars of coal in question at Hammond, Indiana, was a delivery to Chicago.

231 Wherefore and for other errors apparent upon the face of the record and proceedings, your petitioner prays that said judgment may be reversed or reversed and the cause remanded, and for such further order and judgment as to law and justice may appertain.

(Signed) EDWARD D. POMEROY
(Signed) HENRY T. MARTIN,
Attorneys for Petitioner Berwind-White Coal Mining Co.

232 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin M. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonza K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest: J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit, on the 8th day of October A. D. 1912, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

No. 8409.

BERWIND-WHITE COAL MINING COMPANY, Petitioner,
vs.
CHICAGO & ERIE RAILROAD COMPANY, Respondent.

OCTOBER 8TH, A. D. 1912.

Certiorari to First District.

And now on this day the Court having duly considered the petition for a writ of Certiorari herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of Certiorari herein.

And it is further considered by the Court that the said
233 Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

234 STATE OF ILLINOIS,
Supreme Court, ss:

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and seal thereof, do hereby certify the above and foregoing to be a true copy of Record from the Appellate Court First District filed on application for writ of certiorari, together with the order of Court denying said writ of certiorari, in a certain cause entitled in this Court No. 8409 Berwind-White Coal Mining Company, Petitioner, vs. Chicago & Erie Railroad Company, Respondent, filed in this office on the 21st day of August, A. D. 1912.

Witness my hand and the seal of said Supreme Court, at Springfield in said State, this 26th day of December, A. D. 1912.

[SEAL.] (Signed) J. McCAN DAVIS,
Clerk of the Supreme Court.

235 STATE OF ILLINOIS,
Coles County, ss:

I, Frank K. Dunn, Chief Justice of the Supreme Court of the State of Illinois, do hereby certify that the attestation and certificate of J. McCan Davis, to the foregoing and annexed Instrument of writing, are in due form of law, and that the said J. McCan Davis, is and at the time of the making of said certificate and attestation, was the Clerk of the Supreme Court of the State of Illinois, and the legal custodian of the papers, documents records and Seal pertaining

to said Court, and is, and at said time was, the proper officer to make such attestation and certificate, and that his signature thereto is genuine.

In Testimony Whereof, I have hereunto subscribed my name, and caused to be affixed the Seal of said Supreme Court, at the City of Charleston, in said County and State this 30th day of December A. D. 1912.

[SEAL.] (Signed) FRANK K. DUNN,
Chief Justice, Supreme Court of Illinois.

STATE OF ILLINOIS,
Sangamon County, ss:

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois, do hereby certify that the Honorable Frank K. Dunn, whose signature appears to the foregoing certificate is and was at the time of signing said certificate, the Chief Justice of said Supreme Court, duly commissioned and qualified in accordance with the laws of the State of Illinois.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Springfield, Illinois, this 31st day of December, A. D. 1912.

[SEAL.] (Signed) J. McCAN DAVIS,
Clerk of the Supreme Court of Illinois.

236 *Certificate of Lodgment.*

UNITED STATES OF AMERICA,
State of Illinois, Appellate Court, First District, ss:

I, Alfred R. Porter, Clerk of the Appellate Court within and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, do hereby certify that there was lodged with me as such Clerk on the twelfth day of December, A. D. 1912, in the matter of the Chicago & Erie Railroad Company, a corporation, appellee, vs. Berwind-White Coal Mining Company, a corporation, appellant;—

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant in error, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Appellate Court, at Chicago, in said State, this third day of January, A. D. 1913.

[Seal of Appellate Court of the First District, State of Illinois, July 1, 1877.]

ALFRED R. PORTER,
Clerk of the Appellate Court,
First District, Illinois.

237 UNITED STATES OF AMERICA,
State of Illinois, Appellate Court, First District, ss:

No. 16955.

CHICAGO & ERIE RAILROAD COMPANY, a Corporation, Appellee,
vs.
BERWIND-WHITE COAL MINING COMPANY, a Corporation, Appellant.

Appeal from the Municipal Court of Chicago.

I, Alfred R. Porter, Clerk of the Appellate Court within and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, do hereby certify that the above and foregoing transcript of record hereto attached, consisting of the cover and pages 1 to 150, both inclusive, is a true, perfect and complete copy of a certain duly authenticated transcript of the record and proceedings of the Municipal Court of Chicago filed in the above entitled cause in said Appellate Court on the third day of October, A. D. 1910, by said appellant.

I further certify that the above and foregoing consisting of pages 151 to 217, both inclusive, is a true, perfect and complete copy of the final order and judgment and all other proceedings and opinion of the said Appellate Court in the above entitled cause of record in my office.

I further certify that the above and foregoing consisting of pages 218 to 235, both inclusive is a true, perfect and complete copy of a certain duly authenticated transcript of the record of the proceedings of the Supreme Court of Illinois filed in said cause in said Appellate Court on the 2nd day of January, A. D. 1913, by said appellant.

In testimony whereof, I have hereunto set my hand affixed the seal of the said Appellate Court, at Chicago, in said State, this 3rd day of January, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal of Appellate Court of the First District, State of Illinois, July 1, 1877.]

ALFRED R. PORTER,
Clerk of the Appellate Court of the First District, Illinois.

238 UNITED STATES OF AMERICA,
State of Illinois, Appellate Court, First District, ss:

I, Ben M. Smith, Presiding Justice of the Appellate Court within and for the First District of the State of Illinois hereby certify that Alfred R. Porter who signed the foregoing certificate, was at the time of signing the same, and is now, Clerk of the said Appellate Court within and for the First District of said State, duly commissioned and qualified; that said Court is a court of record, having a Clerk and Seal; that said attestation is in due form and by the

proper officer, answering to the laws of the State of Illinois; and that the foregoing signature of said Clerk is genuine.

Witness my hand and seal at Chicago, in said State, this 3rd day of January, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal of Appellate Court of the First District, State of Illinois, July 1, 1877.]

BEN M. SMITH. [SEAL.]
Presiding Justice, Appellate Court,
First District, Illinois.

239 UNITED STATES OF AMERICA.
State of Illinois, Appellate Court, First District, ss:

I, Alfred R. Porter, Clerk of the Appellate Court within and for the First District of the State of Illinois, do hereby certify that the Honorable Ben M. Smith is Presiding Justice of said Appellate Court, duly commissioned and qualified, and was such Presiding Justice at the date of the foregoing certificate, and that his signature thereto attached is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Appellate Court at Chicago, in said State, this 3rd day of January, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal of Appellate Court of the First District, State of Illinois, July 1, 1877.]

ALFRED R. PORTER,
Clerk of the Appellate Court of the
First District, Illinois.

240 Supreme Court of the United States.

BERWIND-WHITE COAL MINING CO., Plaintiff in Error,
vs.
CHICAGO & ERIE RAILROAD CO., Defendant in Error.

Assignment of Errors.

And now comes Berwind-White Coal Mining Co., plaintiff in error, and makes and files this, its assignment of errors.

I. The Appellate Court of Illinois erred in not reversing the case because there was no evidence to support the judgment.

II. The Appellate Court of Illinois erred in not reversing the case because in the Municipal Court of Chicago a peremptory instruction was given to find the issues for the plaintiff.

III. The Appellate Court of Illinois erred and the Trial Court erred in improperly refusing to consider or give effect to a right or immunity specifically set up and claimed on the trial of said cause, and upon the appeal thereof in the Appellate Court by plaintiff in error under a statute of the United States in this. That said action was

instituted and verdict of a jury had, taken, and entered to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois to and into the State of Illinois without having filed, printed, published, or kept open to public inspection, prior to such carriage, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding, as required by the act of Congress commonly known as the Interstate Commerce Act, and all amendments thereof and thereto passed in the years 1887 to 1910, wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act and all amendments
241 thereto, a tariff showing the charges to recover which it instituted its action against the defendant, for which the verdict of a jury by direction of the Trial Court was taken and entered, it was unlawful for the plaintiff to assert or enforce the same and the defendant was and is entitled to invoke said Act of Congress above mentioned in defense to said action and did so invoke the same, but the defense of non-compliance by said plaintiff with the Interstate Commerce Act so invoked and relied upon by the defendant, was improperly decided and determined against the defendant and no force or effect given to the provisions of the Interstate Commerce Act in that behalf.

IV. The Appellate Court of Illinois erred in not holding that the verdict was contrary to and in effect nullified the provisions of the Interstate Commerce Act requiring the publishing and posting of tariffs showing the charges made the basis of said action and for which the verdict was rendered, taken, and entered by the Court.

V. The Appellate Court erred in not holding that the Trial Court erred in overruling defendant's motion for new trial.

VI. The Appellate Court erred in holding that an agreement to pay demurrage charges or fixing the amount thereof upon interstate shipments, when not fixed by a tariff, is binding upon the parties and not contrary to the Interstate Commerce Act.

VII. The Appellate Court erred in holding that failure to file tariffs or failure to comply with the Interstate Commerce Act, which was in effect prior to August 29, 1906, did not effect the right to make a demurrage charge.

VIII. The Appellate Court erred in holding that the evidence shows a compliance with the Interstate Commerce Act in the filing of tariffs in this case.

IX. The Appellate Court erred in holding that demurrage is no part of the transportation under the Interstate Commerce Act.

X. The Appellate Court erred in holding that the right to
242 charge demurrage on interstate shipments is a common law right, which right was not and is not affected by the Interstate Commerce Act and that demurrage may be recovered where a carrier has filed no tariffs or has filed defective tariffs which did not comply with the Interstate Commerce Act.

XI. The Appellate Court erred in holding that a delivery of the cars of coal in question at Hammond, Indiana, was a delivery to Chicago, for the purpose of assessing demurrage where there was no

specific tariff authority therefor, pursuant to the terms of the Interstate Commerce Act.

XII. The Appellate Court erred in holding that demurrage could be charged upon cars in question before they reached their destination, without a specific tariff authority therefor.

For which errors plaintiff in error, Berwind-White Coal Mining Company, prays that the said judgment of the Appellate Court of Illinois, First District, be reversed and judgment rendered in favor of plaintiff in error, Berwind-White Coal Mining Company, and for costs.

EDWARD D. POMEROY,
HENRY T. MARTIN,
Attorneys for Berwind-White Coal Mining Company.

243 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

BERWIND-WHITE COAL MINING COMPANY, Plaintiff in Error,
vs.
CHICAGO & ERIE RAILROAD COMPANY, Defendant in Error.

It is hereby stipulated by and between Edward D. Pomeroy, counsel for plaintiff in error, and William J. Calhoun, Will H. Lyford and James R. McSherry, counsel for defendant in error, that in order to save expense in the printing of the record herein, certain portions of the record may be omitted, the remaining portions being sufficient to show the errors complained of, the portions to be omitted being as follows, to-wit:

√1. Præcipe, Page 2.
√2. Summons, Page 12.
√3. Appearance, Page 13.
√4. Order extending time for affidavit of merits, Page 16.
√5. All of pages 17-18-19-20.
√6. Appeal bond to the Appellate Court, Page 26.
√7. Calendar for the year 1906, Page 130.
√8. All of pages 156-157-158-159.
√9. All of pages 175-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192.
√10. All of pages 212-213-214.
√11. All of pages 221-222-223-224-225-226-227.

It is further stipulated that only one of the notices of arrival, Exhibits 5 to 149 inclusive, viz. Exhibit 5, Page 70, and only one of the reconsigning orders, Exhibits 152 to 253 inclusive, viz. Exhibit 184, Page 84, shall be printed. That under the arrival notice
244 so printed, there shall be a notation printed as follows: "The arrival notice for each of the other cars involved is in the same words and figures as the above, except the dates and the numbers and initials of the cars, 68 of which are dated Prior to August 29, 1906, and 80 of which are dated subsequent thereto, the demurrage upon the first 68 of which cars, if legally assessed, amounts

to $1163.00, and the demurrage upon the remaining 80 cars, if legally asessed, amounts to $662.00." And that under the reconsigning order so printed, there shall be a notation printed as follows: "The reconsigning order for each of the other cars involved is in the same words and figures as the above, except the dates, numbers and initials of the cars, the destination and parties to whom reconsigned. (the reconsigning orders on the 68 cars, as to which the arrival notices were dated prior to August 29, 1906, were received prior to that date,) 40 of said cars being reconsigned to Peabody Coal Company, Lincoln and Grace Street-, Chicago, via C. & N. W. Ry., 59 of said cars being reconsigned to F. G. Hartwell Co., 14th & Clark Sts., Chicago, on the Chicago & Erie Railroad, 6 of said cars being reconsigned to Swift & Company, Union Stock Yards, Chicago, via Chicago Junction Ry., 5 of said cars being reconsigned to Collins & Wiese, Clark & Addition Sts., Chicago, via C., M. & St. P. R. R., 3 of said cars being reconsigned to Henry Hafer & Son Coal Co., 24th & Stewart Ave., vis Belt Ry., 6 of said cars being reconsigned to Hunter W. Finch & Co., Chicago, Illinois, 3 of said cars being reconsigned to North Western Fuel Co., Chicago, Illinois, 3 of said cars being reconsigned to Ready & Callaghan Coal Co., 47th & Halsted St-., Chicago, via Chicago Junction Ry., 1 of said cars being reconsigned to Edward J. Tehle, C., B. & Q. and Homan Ave., Chicago, via C., B. & Q. Ry., 4 of said cars being reconsigned to L. O. Rand, 73rd & Belt Railway, Chicago, via Belt Ry., 6 of said cars being reconsigned to Pintsch Construction Co., Archer Ave. & Howe Place, Chicago, via Chicago & Alton, 1 of said cars being reconsigned to Auburn Coal & Van Co., 79th & Wallace Sts.,
245 Chicago, via Belt Ry., 1 of said cars being reconsigned to J. E. Decker Coal Co., 40th Ave. & Chicago Terminal Transfer R. R., via Chicago Terminal Transfer R. R., 1 of said cars being reconsigned to Peter Reinberg, Summerdale, Illinois, via C. & N. W. 1 of said cars being reconsigned to T. W. Gray, 42nd & Taylor, Chicago, via Chicago Terminal Transfer R. R., 1 of said cars being reconsigned to Garden City Fuel Co., 14th & Team Tracks, Chicago, via Chicago & Erie R. R., 1 of said cars being reconsigned to R. B. Steven, Wheaton, Illinois, one of said cars being reconsigned to Dennis O'Rourke, 39th & Union Sts., Chicago, via Chicago Junction Ry., 1 of said cars being reconsigned to Lee Bros., Elgin, Illinois, via C. & N. W., 1 of said cars being reconsigned to Joseph Lister, Deering Sta., Chicago, via C., M. & St. P., 1 of said cars being reconsigned to Otis Elevator Company, 16th & Laflin Sts., Chicago, via C., B. & Q., 2 of said cars being reconsigned to H. McBride, Elgin, Illinois, and upon some of which appears the notation 'send car service bills to this office for collection' or other language of similar purport, instead of 'we pay car service,' said notations being in typewriting."

It is further stipulated and agreed, that if from oversight or omission, any necessary part of the record be not thus printed, that the plaintiff in error has the right to print, or may be required by defendant in error to print, and further or additional portions thereof.

It is futher stipulated that there shall be printed at the end of said printed record, a notation as follows:

"A petition for writ of error to the United States Supreme Court, prayer for reversal, and assignment of errors, assigning the same errors as are assigned in the Supreme Court of the United States, was filed in the Appellate Court of Illinois, First District, which petition was denied."

246 Dated March 17th, 1913.

EDWARD D. POMEROY,
Counsel for Plaintiff in Error.
WILLIAM J. CALHOUN,
WILL H. LYFORD,
JAMES R. McSHERRY,
Counsel for Defendant in Error.

[Endorsed:] 915. 23490. In the Supreme Court of the United States. Berwind-White Coal Mining Company, Plaintiff in Error, vs. Chicago & Erie Railroad Company, Defendant in Error. Stipulation. Pomeroy & Martin, Attorneys and Counselors, Fisher Building, Chicago.

247 [Endorsed:] File No. 23,490. Supreme Court U. S. October Term, 1912. Term No. 915. Berwind-White Coal Mining Co., Pl'ff in Error, vs. Chicago & Erie Railroad Co. Stipulation as to parts of record to be omitted in printing. Filed March 19, 1913.

Endorsed on cover: File No. 23,490. Illinois Appellate Court. First District. Term No. 915. Berwind-White Coal Mining Company, plaintiff in error, vs. Chicago and Erie Railroad Company. Filed January 7, 1913. File No. 23,490.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 92

BERWIND-WHITE COAL MINING COMPANY,
Plaintiff in Error,

vs.

CHICAGO AND ERIE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD D. POMEROY,
HENRY T. MARTIN,
Counsel for Plaintiff in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

Cases Cited.

IN THE

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Plaintiff in Error,

vs.

CHICAGO AND ERIE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit brought in assumpsit by defendant in error against plaintiff in error, in the Municipal Court of Chicago, Illinois, where a peremptory instruction was given by the court to find a verdict for defendant in error, which instruction was as follows: "The court instructs the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $1785.00" (Trans., 74), upon which instruction the jury returned a verdict as directed (Trans., 13). Judgment was entered on the verdict for the sum of Seventeen Hundred Eighty-five Dollars ($1785) (Trans., 13), whereupon plaintiff in error appealed to the Appellate Court of Illinois, First District, where the judgment was affirmed (Trans., 80). A petition to the Supreme Court of Illinois for a writ of certiorari was filed, which was denied (Trans., 100).

Thereafter, a writ of error was allowed by this court by the late Mr. Justice Lurton (Trans., 91), the writ being directed to the Appellate Court of Illinois, First District, which was the highest state court in which a decision could be had (Trans., 95).

The suit was instituted to recover certain alleged demurrage charges which defendant in error claimed had accrued upon 148 cars of coal while being held at Hammond, Indiana, by reason of plaintiff in error's failure to unload or reconsign them within the free time allowed under certain alleged demurrage rules of the Chicago Car Service Association, of which association defendant in error was a member (Trans., 3 to 11).

Plaintiff in error is a large coal shipper, having its mines at Berwind, West Virginia, and handles its own product in Chicago, and during the course of its business, shipped a large number of cars of coal to Chicago over the lines of defendant in error.

The cars in question were all consigned by plaintiff in error at Berwind, West Virginia, to itself at Chicago, Illinois, and so billed by defendant in error during a period of time covering from May 10, 1906, to December 7, 1906 (Trans., 6 to 11), and the freight from Berwind to Chicago was paid upon each car (Trans., 32).

Plaintiff in error received notice by messenger from time to time that certain of the cars upon which the alleged demurrage was assessed, giving their numbers, had arrived at Hammond, Indiana (Trans., 33 and 39), a point twenty-one miles from the Chicago terminal of defendant in error, and in the State of Indiana, where defendant in error has a storage yard, but received no notices that they had arrived at Chicago, Illinois. Plaintiff in error after receipt of notice of arrival at Hammond, gave a reconsigning order for the movement of

each car from Hammond, directing the place to which it desired the same shipped (Trans., 105, Trans., 39), practically all of which were shipped to various points in Chicago (Trans., 106).

There was in existence, during the period of time in question, an Association between railroads entering Chicago called "The Chicago Car Service Association," which had its own manager who propounded rules covering demurrage within the territory bounded by Lake Michigan on the east; Waukegan, Illinois, on the north; thence following and including the line of the Elgin, Joliet and Eastern Railway to and including Griffith, Indiana; thence north to Edgemoor, Indiana, on Lake Michigan (Trans., 21), in which territory both Hammond and Chicago are located.

The shipments in question were all interstate and a new Interstate Commerce Act went into force on August 29, 1906. Sixty-eight (68) cars upon which $1163.00 was assessed, were shipped prior to August 29, 1906, and eighty (80) cars upon which $662.00 was assessed were shipped subsequent thereto (Trans., 106).

The basis of the demurrage charges in question was an alleged tariff of the Chicago Car Service Association which consisted of a booklet, a printed circular and several letters to the Secretary of the Commission, all of which were introduced in evidence by defendant in error and show that the alleged tariff was sought to be created in the following manner: On August 26th, 1904, defendant in error wrote to the Secretary of the Interstate Commerce Commission the letter following (Trans., 29), (Exhibit 3):

"Erie Railroad Company.
General Freight Agent's Office, Railway Exchange.
Erie Lines West of Buffalo & Salamanca.
In your reply please refer to File Dot. R-5435 I. C. C. A-2427.

CHICAGO, Ill., Aug. 26th, 1904.

Mr. J. M. Smith,
Auditor, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR:

I enclose you herewith a copy of Chicago Car Service Association Car Service and Storage Rules, effective September 1st, 1904, which cancels the rules previously filed as per our letter of May 19th, 1904.

Yours truly,

C. L. THOMAS,
General Freight Agent."

Enc. #6

Enclosing therewith a pamphlet about four by five inches in size and containing 12 pages (Trans., 21), which bore the label of The Chicago Car Service Association and was entitled "Car Service and Storage Rules" (Trans., 21), (Exhibit 1), the material parts of which are as follows:

"Rules and Instructions to Agents
September 1, 1904—(Amended).

Rule 1.

Freight in carloads is subject to the following car service rules; and freight held in railroad warehouses or on platforms is subject to the following storage rules:

Rule 2. Free Time.

(A) Forty-eight hours will be allowed for loading or unloading cars.

(B) When the same car is reloaded, ninety-six hours will be allowed for unloading and reloading.

(C) Forty-eight hours will be allowed on storage tracks of railroad bringing cars into territory of the Association for the placing of reconsignment or switching orders, but this will not apply when cars are moved from one delivery track to another for accommodation of consignee.

Rule 3. Computing Time.

(A) Time will be computed from the first 7 A. M. after notice of arrival when cars are held for orders, and from first 7 A. M. after notice of placing on public delivery track when cars are held for unloading, except as hereinafter provided. For cars delivered on private tracks, time will be computed from the first 7 A. M. after cars have been placed.

(B) In all cases covered by these rules, notice of arrival of cars held for orders and of cars placed upon public delivery tracks shall be served personally or by deposit in the United States Post Office, or by any other means established by custom or mutually agreed upon between agents and consignees. If given by mail, the notice shall date from time of deposit in the Post Office.

The placing of a car upon a private track shall be construed as notice of delivery.

Rule 7. Coal & Coke. (Amended November 15, 1905).

Cars loaded with coal and coke may be held on storage tracks of the railroads bringing cars into the territory of the Association for a period of five (5) days' free time for disposition.

Rule 12. Car Service Charges.

(A) At the expiration of free time, each member will collect car service charges according to its schedule of rates for all unreasonable detention of cars held for loading or unloading or subject to orders of consignors, consignees or their agents.

Rule 16. Weather.

Agents will collect car service charges regardless of the state of the weather, unless exemption is authorized by the manager."

It will be noted that this booklet nowhere says anything about how much the charge will be or whether by e day, week, car, ton or pound.

A letter was afterward written by defendant in error October 23, 1905, to J. M. Smith, Auditor of the Interstate Commerce Commission, enclosing a small printed tice "To Whom It May Concern," which stated that e time of coal and coke would be changed from seven

to five days (Trans., 28), (Exhibit 2). On August 30, 1904, defendant in error wrote a letter to J. M. Smith, Auditor of the Interstate Commerce Commission as follows (Trans., 30), (Exhibit 3):

"Erie Railroad Company.
General Freight Agent's Office, Railway Exchange.
Erie Lines West of Buffalo & Salamanca.

In reply please refer to File Dot. R. 5345 L. C. C. A. 2427.

CHICAGO, Ill., August 30, 1904.

Mr. J. M. Smith,
Auditor, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR:

Referring to our letter of the 26th inst. under above numbers, enclosing copy of The Chicago Car Service Association Car Service and Storage Rules, effective September 1st, 1904.

In connection therewith, beg to advise that our rates will be—

Car Service, One Dollar ($1.00) per car per day or fraction thereof.

Storage, Five cents (5c) per ton per day or fraction thereof. Effective September 1st, 1904.

Yours truly,

C. L. THOMAS,
General Freight Agent, Whittlesey.

The pamphlet above referred to was again enclosed with a letter to the Secretary of the Commission under date of September 12, 1906 (Trans., 30), together with certain circulars not material to this case.

The pamphlet and letters above referred to were the only evidence of an established tariff to sustain defendant in error's right to collect demurrage in this case. No evidence was introduced to show the same had been printed in large type on regulation size tariff sheets for distribution, publication or posting, or that they had been published, posted, or kept open to public inspection, or that there had been any attempt to do so, or that they

were in any way referred to in any of the shipping tariffs.

The coal was billed to Chicago (Trans., 32). The demurrage in question was assessed for delay at Hammond, Indiana (Trans., 6, 7, 8, 9, 10, 11), an intermediate point where defendant in error has a storage yard and where it holds carload shipments billed to Chicago "flat" for its own convenience (Trans., 62).

To the introduction of each of these documents, plaintiff in error objected upon the ground that Exhibit 1 (the booklet) does not state the rate, or how much per day, or for any other time; there is no amount mentioned in dollars and cents or any other figures; that it is not referred to in the tariff under which the shipments arose; that it does not fix the time when it is to go into effect; it is not printed according to the Interstate Commerce Law, and there is no showing that it has been printed, distributed, posted or kept open to public inspection; that it does not purport to be a tariff; that the letter attached (August 30, 1904), is in no sense a tariff or anything the public could or would have inspected, nor was it published or distributed, and is not in compliance with the Interstate Commerce Act, because the Act provides it must be printed in large type and distributed to the different stations; it does not refer to the tariff under which the shipment was made, nor does the tariff under which the shipment was made, refer to it.

The second sheet attached (Trans., 28) was objected to for the same reasons and on the further ground that it purported to be only a notice and not a tariff, and does not show on its face that it was ever sent to the Commission at all.

As to Exhibit 3 (Trans., 29-30) all the papers attached appear to be merely letters to J. M. Smith, Auditor of

the Commission, and do not purport to be tariffs at all; they do not comply with the law as to tariffs; do not refer to the tariffs under which the shipments were made, nor do the tariffs refer to them, and are not printed in compliance with the Interstate Commerce Act (Trans., 19), all of which objections were overruled by the court and exception taken (Trans., 20).

Certain records of defendant in error kept at Hammond, Indiana, were then offered in evidence for the purpose of showing the date of arrival of each car at Hammond, Indiana (Trans., 60), and witnesses produced to show a custom of holding cars at Hammond, which were billed to Chicago (Trans., 61-63), to which plaintiff in error objected that the railroad could not alone create such a custom, and on the further ground that there was a legal duty for which they were paid to carry them through and the cars must be brought to destination before demurrage could be assessed (Trans., 62) and that custom could not prevail over positive law (Trans., 63), which objections were overruled by the court (Trans., 62-63) and to which rulings of the court, exceptions were taken (Trans., 62-63).

At the close of plaintiff's case, plaintiff in error offered its written motion and instruction to find the issues for defendant, which was overruled and instruction refused by the court (Trans., 72). Plaintiff in error offered no evidence and at the close of all the evidence, renewed its motion and again offered its instruction to find the issues for the defendant, which was again refused by the court and exception taken (Trans., 73), whereupon defendant in error offered its written motion and instruction to find the issues for the plaintiff, which was given and to which plaintiff in error excepted (Trans., 74).

All the above objections and exceptions were covered

by the points mentioned in the motion for a new trial (Trans., 75) and in the assignments of error in the Appellate Court (Trans., 77) and in the assignments of error attached to the petition to the Supreme Court of Illinois for a writ of certiorari (Trans., 97).

There are four points involved in this case:

1. Do the documents introduced in evidence or any of them, constitute a tariff under the terms of the Interstate Commerce Act as it existed either prior or subsequent to August 29, 1906?

2. Could charges for demurrage be assessed at said times upon interstate shipments without some definite tariff authority therefor?

3. If the documents in evidence do constitute a tariff under the Interstate Commerce Act, then under its terms, could demurrage be charged upon shipments before they reached their destination?

4. Where there is a through shipment under the Interstate Commerce Act, can the carrier assess demurrage before the shipment is complete?

Specification of Errors Relied Upon.

The errors specifically relied upon by the plaintiff in error are the following:

I.

The Appellate Court of Illinois erred in not reversing the case because there was no evidence to support the judgment.

II.

The Appellate Court of Illinois erred in not reversing the case because in the Municipal Court of Chicago, a peremptory instruction was given to find the issues for the plaintiff.

III.

The Appellate Court of Illinois erred and the trial court erred in improperly refusing to consider or give effect to a right or immunity specifically set up and claimed on the trial of said cause and upon the appeal thereof in the Appellate Court by plaintiff in error, under a Statute of the United States in this: That said action was instituted and a verdict of a jury had, taken and entered to recover charges by the plaintiff alleged to be due from the defendant to the plaintiff on account of shipments of coal from states other than Illinois, to and into the State of Illinois, without having filed, printed, published or kept open to public inspection, prior to such carriage, a tariff or tariffs showing the charges thus made and sought to be recovered in this proceeding, as required by the Act of Congress commonly known as the Interstate Commerce Act, and all amendments thereof and thereto, passed in the years 1887 to 1910, wherefore, the plaintiff, not having printed, published and filed, as required by said Interstate Commerce Act, and all amendments thereto, a tariff showing the charges to recover which it instituted its action against the defendant, for which the verdict of a jury by direction of the trial court was taken and entered, it was unlawful for the plaintiff to assert or enforce the same, and the defendant was and is entitled to invoke said Act of Congress above mentioned in defense to said action, and did so invoke

the same, but the defense of non-compliance by said plaintiff with the Interstate Commerce Act so invoked and relied upon by the defendant, was improperly decided and determined against the defendant and no force or effect given to the provisions of the Interstate Commerce Act in that behalf.

IV.

The Appellate Court of Illinois erred in not holding that the verdict was contrary to and in effect nullified the provisions of the Interstate Commerce Act requiring the publishing and posting of tariffs, showing the charges made the basis of said action, and for which the verdict was rendered, taken and entered by the court.

V.

The Appellate Court erred in not holding that the trial court erred in overruling defendant's motion for a new trial.

VI.

The Appellate Court erred in holding that an agreement to pay demurrage charges or fixing the amount thereof upon interstate shipments, when not fixed by a tariff, is binding upon the parties and not contrary to the Interstate Commerce Act.

VII.

The Appellate Court erred in holding that the failure to file tariffs or failure to comply with the Interstate Commerce Act, which was in effect prior to August 29, 1906, did not affect the right to make a demurrage charge.

VIII.

The Appellate Court erred in holding that the evidence shows a compliance with the Interstate Commerce Act in the filing of tariffs in this case.

IX.

The Appellate Court erred in holding that demurrage is not part of the transportation under the Interstate Commerce Act.

X.

The Appellate Court erred in holding that the right to charge demurrage on interstate shipments is a common law right, which was not and is not affected by the Interstate Commerce Act, and that demurrage may be recovered where a carrier has no tariffs or has filed defective tariffs, which do not comply with the Interstate Commerce Act.

XI.

The Appellate Court erred in holding that a delivery of the cars of coal in question at Hammond, Indiana, was a delivery to Chicago, for the purpose of assessing demurrage where there was no specific tariff authority therefor, pursuant to the terms of the Interstate Commerce Act.

XII.

The Appellate Court erred in holding that demurrage could be charged upon cars in question before they reached their destination, without a specific tariff authority therefor.

ARGUMENT.

I.

THE BOOKLET OF THE CHICAGO CAR SERVICE ASSOCIATION AND THE LETTERS AND CIRCULAR WHICH WERE MAILED TO THE SECRETARY OF THE INTERSTATE COMMERCE COMMISSION DO NOT CONSTITUTE A TARIFF.

The Interstate Commerce Act in force on August 29, 1904 (3 Comp. Stat. U. S., p. 3155), the date when the first step was taken toward establishing the alleged tariff under which the demurrage involved in this case was assessed, contained the following provisions (Sec. 6) with reference to the filing of tariffs:

> "Every common carrier subject to the provisions of this Act *shall* print and keep open to public inspection schedules showing the rates and fares and charges * * * which any such common carrier has established and *which are in force* at the time upon its route * * * and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places * * * in such form that they shall be accessible to the public and can be conveniently inspected."

Then follows a provision that no change in rates can be made without public notice by either printing new schedules or plainly indicating the changes on the old one, and proceeds:

> "And when any such common carrier shall have *established and published its rates*, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge,

demand, collect, or receive from any person or persons a greater or less compensation * * * than is specified in such *published* schedule * * * at the time in force."

"Every common carrier * * * shall file with the Commission * * * copies of its schedules of rates, fares, and charges *which have been established and published* * * *;"

and then provides for punishment for failure or refusal to comply with the above requirements.

Under these provisions of the law prior to August, 1906, it was necessary to both *establish and publish* the rate before filing it with the Commission, and then file the rates "which have been established and published."

The first step taken by defendant in error toward the creation of the alleged tariff covering demurrage, was by mailing to the secretary of the Interstate Commerce Commission a small booklet about four by five inches in size, labeled "The Chicago Car Service Association, Car Service and Storage Rules" (Trans., 21), which is shown to have been filed with the Commission August 29, 1904 (Trans., 20).

This book of car service rules of the Chicago Car Service Association filed by defendant in error complied with none of the requirements of the Act. It does not specify any fixed charge that is to be made, but in Rule 12 (Trans., 25), provides that "*At the expiration of free time* each member shall collect car service charges according to *its schedule of rates for all unreasonable* detention of cars held for loading, unloading, or subject to orders of consignors, consignees, or their agents," thus plainly indicating that the demurrage, if assessed at all, must be assessed under some tariff of the individual member on file with the Commission, fixing the charge which might, under this Rule, be fixed by one member at one price and by another member at a different price. No such schedule

of defendant in error was produced upon the trial. This booklet does not specify whether the charges shall be made by the car, ton or pound, or by the day, hour or week, and under Rule 16 (Trans., 26) it authorizes the General Manager to authorize exemptions in certain cases. It is not shown to have been "established and published" before it was filed with the Commission, nor printed nor kept open to public inspection so that it might have been inspected by the public, all of which seem to have been necessary prerequisities before filing with the Commission under the law as it then existed. It is not plainly printed in large type, as provided by the Act. It does not purport to be a tariff on its face, and is labeled on the inside at the top of the first page of rules (Trans., 22), "Rules and Instructions to Agents," which is probably all it was ever intended to be, and was not intended for the use of the public at all. In fact, the booklet is not a compliance with a single one of the provisions of the Act as it then existed, and is, therefore, not a tariff at all.

The circular mailed to the Commission on October 18, 1905 (Trans., 28) merely changes the free time and is subject to all the objections urged to the booklet.

It follows, then, that if the above documents do not constitute a tariff, there is none upon which to base the charges in this case, unless contained in some other tariff. The only other document introduced, which has any bearing upon the subject, was a letter of the defendant in error to the secretary of the Interstate Commerce Commission under date of August 30, 1904 (Trans., 20). This letter is as follows:

"*Mr. J. M. Smith,*
Auditor, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR:

Referring to our letter of the 26th inst. under

above numbers, enclosing copy of The Chicago Car Service Association Car Service and Storage Rules, *effective September 1st, 1904.*

In connection therewith, beg to advise that our rates *will be*—

Car Service, One Dollar ($1.00) per car per day, or fraction thereof.

Storage, Five cents (5c) per ton per day, or fraction thereof.

Effective September 1st, 1904.

Yours truly,

C. L. THOMAS,

General Freight Agent, Whittlesey."

Certainly this letter, standing alone, can not be construed to be a tariff or even a supplement to one. It does not comply with a single provision of the Interstate Commerce Act with reference to the creation of tariffs. It does not appear to have been intended as such or so treated by the Commission, but is merely a part of the general correspondence of the Commission, which no shipper would ever have discovered in making a search for rates. It is not referred to in the booklet or noted thereon.

The language of this letter precludes the idea that the booklet was a tariff established under the provision of the Interstate Commerce Act. It shows that the booklet was mailed August 26, 1904, *to become effective September* 1, 1904, and states that our rates "*will be,*" while the language of the Act is "and when any common carrier *shall have established and published its rates*" it shall file with the Commission the rates "*which have been established and published,*" thus plainly showing that no such rate had been "established and published" prior to the time when it was filed with the Commission.

It also appears from the letter which accompanied the booklet (Trans., 29), that it "cancels the rates previously filed, as per our letter of May 19th, 1904,"—Section 6 of

the Interstate Commerce Act, as it then existed, provided that no advance in rates which had been established could be made except after ten days' public notice and giving the time when the increase would go into effect and that reductions is published rates should only be made after three days' public notice. If a new tariff was filed canceling the old one, either ten days' notice or three days' notice was required, depending upon whether the rate was increased or decreased. No such notice appears to have been given for the purpose of establishing this booklet as a tariff.

It will be noted that 68 of the cars in question were shipped under the Act as it existed prior to August 29, 1906, and 80 cars thereafter (Trans., 105).

On September 12, 1906, defendant in error wrote a letter to the Secretary of the Commission (Trans., 30), in which it enclosed certain circulars and another copy of the booklet above referred to, as follows:

"Erie Railroad Company,
General Freight Agent's Office, Railway Exchange,
Erie Lines West of Buffalo & Salamanca.

In your reply please refer to File Dot. R-5435 I. C. C. No. A-2427.

Chicago, Ill., September 12th, 1906.

Mr. J. M. Smith,
Asst. Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

I enclose herewith a copy of the rules of the Chicago Car Service Ass'n, same covering car service and storage rules in effect at Chicago, same being effective September 1st, 1904. Also Chicago Car Service Ass'n Circulars Nos. 1, 2, 3, 4, 5, 6, and 7 together with supplement to the rules issued September 3rd, 1906.

Will you please acknowledge receipt.

Yours truly,
C. W. Clarke,
General Freight Agent.
W. M. N."

The purpose in mailing this second copy is not apparent unless for the purpose of complying with Section 6 of the new Act (Comp. Stat. U. S. Supl. 1911, p. 1288), which provides:

> "That every common carrier subject to the provisions of this Act shall file with the commission created by this Act, and print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation, * * *"

If it was intended to file a tariff in compliance with the new act, its requirements were not complied with for several reasons:

First. It does not state how much the charge will be, and the letter of August 30, 1904, the only document which ever mentioned the price, was not re-filed. *Second.* Because it does not state whether the charge will be by the car, ton, or some other measure, or by the day or some other measure of time. *Third.* Because it states (Rule 12, Trans., 25) that each carrier will charge according to its schedule of rates, plainly indicating that if a charge is to be made it must be based on some other tariff. *Fourth.* Because it is not printed in large type, or published or posted so that it can be inspected by the public. *Fifth.* Because it does not purport to be a tariff but merely "rules and instructions to agents." *Sixth.* Because it states no time when it will become effective. *Seventh.* Under the Act of 1906 (Sec. 6) no change could be made "except after thirty days' notice to the Commission and to the public," and no such notice was given.

The mere filing of these documents with the Commission did not make them a tariff, unless, in fact, they were such. The filing gave them no force unless they were in compliance with the law.

The Interstate Commerce Commission in the case of

England & Co. v. *B. & O. R. R. Co.*, 13 I. C. C. R., 614, in an opinion by Commissioner Harlan, at page 619, says:

> "It is proper to add that the defendant's tariff then in force covering the storage and insurance of ex-lake grain at West Fairport, was not a lawful tariff in that while providing for storage, it failed to fix the amount of the storage charges or to establish, by reference to other tariffs or otherwise, any specific basis for estimating charges. The tariff now in force in that behalf is defective in the same respect and ought immediately to be amended. In its present form the tariff is unlawful."

In *Porter* v. *St. L. & S. F. R. R. Co.*, 15 I. C. C. R., at page 4, Commissioner Cockerell says:

> "The Act to regulate commerce contemplates not only just and reasonable rates, but plain and intelligible rates. Complication, intricacy and involution invite, if they do not intend, injustice, inequality and discrimination. A rate or tariff published and filed with the Commission can not be held to be legal merely because of that fact; it must also be plain and intelligible. The Commission has emphasized this time and again in as many varying ways as the constantly recurring tariff inconsistencies have necessitated."

II.

THE ALLEGED TARIFFS IN QUESTION WERE NEVER ESTABLISHED.

Under Section 6 of the Act prior to August, 1906 (3 Comp. Stat. U. S., p. 3156), every common carrier was required to "print and keep open to public inspection, schedules showing the rates and fares and charges," etc., and later in the same section, it provides for posting in two public and conspicuous places so that they would be accessible to the public. Section 6 as amended (34 Stat. L. 584—U. S. Comp. Stat. Supp. 1911, p. 1288) provided that every common carrier "shall file with the Commission created by this Act, and print and keep open to

public inspection, schedules showing all the rates," etc., and later in the same section, it provides for posting copies in the various stations.

The question arises as to just what is necessary to create a tariff. Does the mere filing with the Commission bring it into existence, or does it require something more? It has been held in the case of *Texas & Pacific Ry. Co.* v. *Cisco Oil Mills*, 204 U. S., 449, and several subsequent cases, that the failure to post did not prevent the tariff from becoming effective, that the posting was a mere matter of convenience, and that the mere failure of an agent at one station to post according to law would not prevent the tariff from becoming operative over the entire system. However, there is no case in which the question was directly involved, which holds that the printing and keeping open to public inspection are unnecessary.

The language of Section 6 of the Act seems to bear out the theory that something more is required. For example, as it stood prior to the amendment of 1906, it says: "No advancement shall be made in the rates, fares and charges which have been established *and published*," etc., and again, "reductions in such *published rates*, fares and charges shall only be made," etc., and also "and when any such common carrier shall have *established and published*" it shall be unlawful to charge a greater or less rate "than is specified in such *published* schedule," and that every common carrier shall file with the Commission its schedules which "have been established *and published*."

The Act of 1906 recites that "no change shall be made in the rates, fares and charges * * * which have been *filed and published*," except after thirty days' notice, and that no carrier shall engage or participate in transportation "unless the rates, fares and charges upon which the

same are transported by said carrier have been *filed and published* in accordance with the provisions of this Act" and no carrier shall charge or collect a greater, less or different compensation than "the rates, fares and charges which are specified in the tariff filed *and in effect* at the time."

It has been repeatedly held both by the courts and the Commission, that a shipper cannot rely upon the statements of an agent of the carrier as to what rates are in force, but he is obliged to "with his head and pencil figure out from the tariff sheets, just what the rate is, both for himself and for his competitors." This being true, if it should be held that the mere filing with the Commission according to law created the tariff and put it in force, a shipper could not safely make any shipment without first going to Washington and consulting all the tariffs on file. If it was the intent of the framers of the Act that no publication whatever was necessary to put the tariffs in force, or the shipper was to be given no opportunity to examine the tariffs, they certainly would not have required of him that which is physically impossible, viz., to ascertain the contents of tariffs which he has had no opportunity to inspect. There is a good reason for holding that the mistake of an agent in failing to post would not prevent the rate from going into force, even though the rule might cause an occasional hardship, but to hold that a tariff is effective where there has been no attempt to publish it, would create widespread disaster among shippers. Section 6, with reference to the creation of tariffs, says: "Shall file with the Commission * * * and print and keep open to public inspection." We think these three things are necessary to the creation of a tariff. It is true that the same section later on provides for the *manner* of keeping them open to the public by posting, but the language plainly

indicates that the posting is not to take place until after they have been created, but the filing, printing and keeping open to public inspection, however, are each a part of the creation of the tariff. In other words, it seems plain from the reading of the whole Act and the purpose for which it was enacted, that the public is to have at least some opportunity of examining the tariffs by which they are bound. While it would not be fatal to fail to advise the public in the exact manner provided for their convenience, that is by posting, yet some effort to comply with the law by at least printing and distributing *to be posted* would be required of the carrier. There is no evidence in this record that any distribution of any kind was ever made of copies of the booklet, or of any effort to do so. It appears on its face to be merely "Rules and Instructions to Agents" and not for the use of the public. The letter of August 30, 1904, which is the only evidence of what the charges were, was not printed at all, but was typewritten and such a letter as usually passes in ordinary correspondence. There is no evidence that a single copy of it was ever printed, or kept open to public inspection, nor is there any evidence that it was ever intended to be regarded as a tariff. Certainly, it was never kept open to public inspection in such manner that it could have been conveniently examined. It is doubtful if such a letter, or any other of the loose, disconnected sheets of paper put in evidence, would have been found on file among the tariffs even if the shipper had gone to Washington and examined the tariffs there on file, as there was nothing contained in the booklet or in any memorandum thereon calling them to attention. To hold a shipper bound by such a document, which does not comply with any of the requirements of the Act and where he has no opportunity to inspect it, would require an unreasonable construction of the Act, which

courts are reluctant to give unless required to do so, by its plain language, or to prevent failure of the object for which it was enacted. Certainly no such condition exists here. It is doubtful if ever another such attempt was made to create a tariff, and if there have been others, they are not sufficient in number to cause any serious interference with the enforcement of the Act in proper cases without opening the door to rebating the prevention of which seems to be the prime object of the Act.

The case of *Illinois Central* v. *Henderson Elevator Company*, 226 U. S., 441, seems at first reading to be an authority against this contention, as the instruction given in the trial court in that case included the words "or on file," but the same instruction contained the failure to post and the erroneous quotation of the agent, either of which was ground for reversal, and these two elements seem to have been what the court passed upon, as there is no mention in the opinion of the failure to have "on file" and the question of whether or not it was necessary to at least print and attempt to distribute was not involved. In that case there was a tariff "published *and* on file with the Interstate Commerce Commission." Just what the court meant by "published" is not clear, but it certainly meant something more than the mere filing, because it mentions both the publishing *and* filing.

III.

THE FILING OF PAPERS WITH THE INTERSTATE COMMERCE COMMISSION RAISES NO PRESUMPTION OF APPROVAL.

"The fact that these circulars have been filed by this defendant with the Commission, and that others containing similar provisions have been filed by other roads, and that this Commission has not heretofore expressed an opinion upon the legality thereof, does

not, as apparently claimed in defendant's answer, raise any presumption of approval by the Commission of the rules or regulations therein set forth or of the manner in which they have been established."

Suffern Hunt & Co. v. *I. D. & W.*, 7 I. C. C. R., 279.

"No presumption arises as to the legality or illegality of the rates from the mere fact of filing the schedules, and rates which are illegal cannot be legalized by any failure to challenge them. The immense number filed and the interminable changes made in rate sheets render such personal inspection and examination by the Commission as would enable it to determine their legality at the time of filing, impracticable. Besides, such *ex parte* inspection and examination by the Commission would neither conclude the carriers as to the reasonableness of their rates nor the public from challenging them."

San Bernardino Board of Trade v. *A. T. & S. F. R. R. Co.*, 3 I. C. C. R., 138-143.

See also:

England & Co. v. *B. & O. R. R. Co.*, 13 I. C. C. R., 614, *supra.*

Porter v. *St. L. & S. F. R. R.*, 15 I. C. C. R., 4.

IV.

DEMURRAGE IS GOVERNED BY THE INTERSTATE COMMERCE ACT.

The Appellate Court of Illinois held that "demurrage charges are no part of and are separate and distinct from transportation charges, and do not arise, if at all, until the transportation is ended" (Trans., 82). The only construction that can be put upon this language is that demurrage upon interstate shipments is not controlled by the Interstate Commerce Act.

The Act as it existed prior to August 29, 1906, required tariffs to be published, stating "separately the terminal

charges and rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges" (Sec. 6), and it was held that the words "receiving, delivering, storage or handling" in Section 1 of the Act were broad enough to cover demurrage charges. *Michie* v. *N. Y. N. H. & H. R. Ry.*, 151 F. R., 694. And in the case of *U. S.* v. *Standard Oil Co.*, 148 F. R., 722, an indictment was held good where the charge was rebating terminal charges as published under a tariff on file with the Interstate Commerce Commission. Evidently these charges were legal or the indictment would have been quashed, and inasmuch as the only excuse for charging the demurrage in the case at bar is that a tariff had been filed with the Commission, the judgment must necessarily fall, if this court should hold that demurrage was not subject to the Act, and the filing with the Commission was a mere nullity.

The Supreme Court of the United States has settled this question so far as the shipments subsequent to August 29, 1906, are concerned, in the following cases:

St. Louis, Iron Mt. & S. Ry. v. *Edwards*, 227 U. S., 265.

C. R. I. & P. Ry. v. *Hardwick*, 226 U. S., 426.

While these cases do not mention actions under the Act prior to 1906, it is apparent that the question was not involved, yet the reasoning of these cases, however, would seem to be as applicable to the one case as to the other, and the Interstate Commerce Reports are filled with cases prior to 1906 in which the Commission dealt with demurrage, the same as other interstate questions.

V.

THERE CAN BE NO CHARGE FOR DEMURRAGE UPON INTERSTATE SHIPMENTS WITHOUT A SPECIFIC TARIFF AUTHORITY THEREFOR.

The Act as it existed prior to August, 1906, required the carrier to file its schedules with the Commission and thereafter "it shall be unlawful for such common carrier to charge, collect, or receive from any person or persons, a greater or less compensation * * * than is specified in such published schedule" (Sec. 6).

The amended Act provides that no carrier "shall engage or participate in the transportation" without having filed and published its tariffs, and provides that it shall not "charge or demand or collect or receive, a greater or less or different compensation * * * than the rates, fares and charges which are specified in the tariff" (Sec. 6).

The Appellate Court of Illinois, in its opinion, stated:

> "We think, upon the evidence, that appellant not only knew that it was required to pay car service, but it agreed to do so" (Trans., 83).

This court has held repeatedly that the published rate should govern and that the value of a service cannot be fixed by agreement.

> *Chicago & Alton* v. *Kirby*, 225 U. S., 155.
>
> *N. H. R. Co.* v. *Interstate Commerce Com.*, 200 U. S., 361-391.
>
> *Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 80-81.
>
> *T. & P. R. Co.* v. *Abeline C. Co.*, 204 U. S, 439.
>
> *T. & P. R. Co.* v. *Mugg*, 202 U. S., 242,

and the Commission has said:

> "We rest our decision of this case on the proposition that demurrage can be assessed only in accord-

ance with tariff provisions, and the rules of the Utah Car Service Association in effect when these cars were delivered did not authorize the demurrage charges in question."

U. S. v. *D. & R. G. R. R. Co.*, 18 I. C. C. R., 7-10.

Monroe & Sons v. *M. C. R. R.*, 17 I. C. C. R., 27-29.

"It has been uniformly held by this Commission that a shipper or consignee may not be required to pay demurrage charge unless the carrier's tariffs provide for the same in clear and specific form and manner (*Monroe & Sons* v. *M. C. R. R.*, 17 I. C. R. R., 27; *Tioga Coal Co.* v. *C. R. I. & P. Ry.*, 18 I. C. C. R., 414)."

Crescent Coal & Mining Co. v. *B. & O.*, 20 I. C. C. R., 569.

In the absence of a published demurrage rate, it is presumed that the through rate embraces terminal charges.

Interstate Commerce Com. v. *C. B. & Q. R. R.*, 186 U. S., 320-328.

The purpose of the Interstate Commerce Act is to fix the rate absolutely and take it out of the realm of contract. The rates on file, being binding upon shipper and carrier alike, as said in the case of *Pennsylvania R. Co.* v. *International Coal M. Co.*, 230 U. S., 184, "The statute required the carrier to abide absolutely by the tariff." The cases of *Texas & P. R. Co.* v. *Mugg*, 202 U. S., 242; *Texas & P. R. Co.* v. *Abeline*, 204 U. S., 426; *Armour P. Co.* v. *U. S.*, 209 U. S., 56; *L. & N. R. R* v *Mottley*, 219 U. S., 467, and *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391, are to the same effect, and Section 6 of the Act says the carrier shall not charge "a greater or less or different compensation than

the rates, fares and charges which are specified in the tariff."

VI.

THE TARIFFS ARE BINDING UPON SHIPPER AND CARRIER ALIKE.

In the case of *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S., 184, this court said in discussing a demurrage tariff:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. 24 Stat. at L. 379, Sec. 2, Chap. 104; U. S. Comp Stat. 1901, p. 3, 155; 25 Stat. at L. 855, Sec. 382; U. S. Com. Stat. Supp. 1911, p. 1289; *Armour Packing Co.* v. *United States*, 209 U. S., 56, 83; 52 L. Ed., 681, 694; 28 Sup. Ct. Rep., 428. The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

If the carrier and shipper are both bound by the tariffs on file, and the carrier cannot charge or demand or collect or receive a greater or less or different compensation than the rates, fares and charges which are specified in the tariff, how can a shipper be liable for a demurrage charge for which there is no tariff authority? If there is no tariff, how much would this charge be, and from what date would the charges begin to run? And would the charge be by the car, ton or some other measure? There is only one way by which charges upon an interstate shipment can be fixed, that is, by a tariff, and if there is no tariff it necessarily follows that there is no charge.

VII.

THE INTERSTATE COMMERCE ACT SUPERSEDES THE COMMON LAW WITH REFERENCE TO INTERSTATE SHIPMENTS.

In its opinion, the Appellate Court said:

> "The right of the carrier to make car service charges is a common law right and not one which is given by statute. The right existed before the Interstate Commerce Commission was created. The mere fact that a carrier has failed to file tariffs or has filed defective tariffs does not in law permit a consignee or owner to escape the payment of the ordinary and usual charges made" (Trans., 83).

The theory upon which such charges could be made at common law was that the shipper had either expressly or impliedly agreed to pay for the service. Since Congress has seen fit to legislate upon this subject and exercise its paramount authority thereby, forbidding the fixing of rates by agreement, all prior laws, whether arising out of a state statute or the common law, have ceased to exist.

St. Louis, Iron M. & S. Ry. v. *Edwards*, 227 U. S., 265.

C. R. I. & P. v. *Hardwick*, 226 U. S., 426.

VIII.

DEMURRAGE CANNOT PROPERLY BE ASSESSED UNTIL THE SHIPMENT HAS REACHED ITS DESTINATION.

It was stipulated upon the trial of this case that all of the shipments in question were made from Berwind, West Virginia, to Chicago, Illinois, and that the freight was paid through (Trans., 32).

The evidence shows that the Erie Railroad stopped all these cars at Hammond, Indiana, and there is where the

cars were at the time the demurrage in question was assessed (Trans., 33). That the Erie has a storage yard at that point and stopped the cars there for its own convenience (Trans., 62). Plaintiff in error did not request that these cars be held at Hammond, Indiana (Trans., 53), nor was it ever consulted, nor did it have anything to say about it. Undoubtedly, the carrier was bound to carry the coal through to Chicago, its destination, and had no right to charge demurrage until the cars had reached their destination.

In the case of *United States* v. *D. & R. G. Ry. Co.*, where carloads of cement were shipped by the Government to Mile Post 679 near Thistle Junction, where the Government was erecting dams, tunnels, ditches, etc., and the cars were held at Thistle Junction, 2½ miles away, upon which the railroad assessed demurrage charges and which the Government contested, the Commission says:

> "The imposition of demurrage charges, if authorized at all, must have been provided for in these sections (referred to in the opinion), as the tariffs of defendant in effect at the time show no other or different demurrage provision. Demurrage does not ordinarily accrue, except upon the delivery of cars at the point specified in the bill of lading, and where charges are imposed for detention of cars at a point other than that so specified, *there must be definite tariff authority therefor.*" *Germain Co.* v. *N. O. & E. R. R. Co.*, 17 I. C. C. R., 22; *Monroe & Sons* v. *Mich. Cent. R. R.*, 17 I. C. C. R., 27.
>
> *U. S.* v. *D. & R. G. R. R. Co.*, 18 I. C. C. R., 9.

And the Commission further on in this opinion says:

> "The fact, if it be a fact, that complainant ordered the delivery of 2 cars per day at one time and 4 cars at another did not warrant the imposition of demurrage charges for which there was no tariff authority. It is not claimed by defendant that placing the cars on tracks at Thistle Junction was delivery at the switch specified, but the contention is made

that in order to accommodate complainant, cars were placed on this switch from day to day in the limited numbers above stated, the balance being held at Thistle Junction. Assuming that this was done, it did not authorize the charging of demurrage on the cars held at the latter station. It follows that the charges in question were not assessed in accordance with any provision in defendant's tariff and therefore do not constitute a valid claim against complainant."

In the case of *Staten Island Rapid Transit Ry. Co.* v. *Marshall*, 136 N. Y. Sup. Ct. App. Div., p. 571, there was a demurrage rule giving 12 days' free time, the detention to be computed from the date of arrival to the date of unloading at St. George, Staten Island coal piers, the court in construing this rule says:

"The question is whether under this rule the date of arrival at Cranford, New Jersey, is the proper date of arrival to be taken in computing the total detention of the car. The language of the rule certainly affords no support for plaintiff's claim and *since the rule is one of plaintiff's own making*, we are not justified in giving to it a *broader construction than its language indicates*, unless the reason of the thing and the surrounding circumstances require us to do so. The rule provides that demurrage will be charged at St. George, Staten Island, for detention. This may not be so narrowly construed as to mean that the demurrage will begin to run only after arrival at the discharging piers, but will be satisfied by treating the arrival at the storage yard at St. George as the date from which the detention is to be computed. (*Hite* v. *Central R. R. of N. J.*, 171 F. R., 370.) Perhaps even the yard at Arlington may be so nearly contiguous to St. George as to fall within the terms of the rule, although there is no evidence in this case warranting such a finding. But by no reasonable and permissible construction of the rule can it be said that it covers cars detained at a yard 12 miles away in another state and upon the lines of another railway. The cars are held at Cranford not by the order of the consignee, but solely for

the convenience of the plaintiff, because its business has outgrown its facilities at its terminal point. We are not concerned now with the question whether or not plaintiff *might have made*, or might make rules charging demurrage for detention at Cranford. The only question is whether *it has done so*. This question, we think, must be answered in the negative."

The facts in the case at bar are substantially the same as in the above two cases. The demurrage in each case was assessed at a point before the shipment reached its destination with no "definite tariff authority therefor"; and this the court holds cannot be done. Therefore, demurrage could not be legally assessed at Hammond, Indiana, which was not the destination of the shipments.

"It has also been held that where a switching service is yet to be performed, delivery has not been effected. (*McNeil* v. *S. Ry. Co.*, 202 U. S., 543, citing *Rhodes* v. *Iowa*, 170 U. S., 412; *L. & N. R. R.* v. *Stock Yards Co.*, 212 U. S., 143; *Union Stock Yards* v. *U. S.*, 164 F. R., 404.)"

Crescent Coal & M. Co. v. *B. & O.*, 20 I. C. R. R., 569.

IX.

THE APPELLATE COURT OF ILLINOIS IS THE HIGHEST COURT IN WHICH A DECISION COULD BE HAD.

Under the laws of the State of Illinois, Section 121, Chapter 110, Hurd's Revised Statutes, as amended and in force July 1, 1909, it is provided:

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Court shall be final, subject to the following exceptions:

(2) In any such case as is hereinbefore made final

in said Appellate Court, it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court; provided, however, that in actions *ex contractu* (exculsive of actions involving a penalty) and in all cases sounding in damages, the judgment exclusive of costs shall be more than One Thousand Dollars ($1000); and provided, also, that application under this Act to the Supreme Court to cause it to require a cause to be certified to it for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court."

And the causes in which appeals and writs of error are specifically required by the Constitution of the State of Illinois are (Section 11, Article 6, Constitution of 1870).

> "In all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved,"

which does not include this case.

A petition was filed by Berwind-White Coal Mining Company in the Supreme Court of Illinois on August 22, 1912, directed to its then next term, beginning October 1, 1912, which was more than twenty days prior to the commencement of said term, praying that the said Supreme Court take cognizance of said cause, by certiorari or otherwise (Trans., 97), which petition and the prayer thereof were on October 8, 1912, denied by said court (Trans., 100), whereby the judgment of the Appellate Court of Illinois was made final.

This action of the Supreme Court in denying the petition for a writ of certiorari, thereby making the judgment of the Appellate Court final, made the Appellate Court the highest court in the State of Illinois, in which a decision could be had and brings this case within the

rule announced in the cases of *Norfolk & Suburban Turnpike Company* v. *Commonwealth of Virginia*, 225 U. S., 264-69, and *Western Union Telegraph Company* v. *Croco*, 220 U. S., 364.

X.

DENIAL OF A RIGHT UNDER THE INTERSTATE COMMERCE ACT RAISES A FEDERAL QUESTION.

The plaintiff upon the trial below based its suit entirely upon an alleged tariff purporting to be established under the Interstate Commerce Act. The defendant defended under the terms of the same Act, and in its motion for a new trial in the trial court (Trans., 75) and in its assignment of errors in the Appellate Court of Illinois (Trans., 77), and in its petition for a writ of certiorari in the Supreme Court of Illinois (Trans., 97), urged that a right, privilege or immunity under the Interstate Commerce Act had been denied, thus raising a federal question, which had been duly preserved by exceptions (Trans., 76), thus giving this court jurisdiction under Section 237 of the Federal Judicial Code.

That the denial of a right under the Interstate Commerce Act gives this court jurisdiction, has lately been decided in the following cases:

Atchison, Topeka & Santa Fe Ry. v. *Robinson*, U. S. Adv. Ops., 1913, 556-58.

Chicago & Alton v. *Kirby*, 225 U. S., 155.

And the denial of a right under other federal statutes has been held sufficient to give this court jurisdiction in each of the following cases:

Seaboard Airline v. *Duval*, 225 U. S., 447.

St. L. I. M. & S. v. *McWhorter*, 229 U. S., 265.

St. L. I. M. & S. v. *Taylor*, 210 U. S., 281.

Eau Claire National Bank v. *Jackman*, 204 U. S., 532.

Nutt v. *Knut*, 200 U. S., 12.

Charleston & W. C. Ry. Co. v. *Thompson*, U. S. Adv. Ops., 1913, p. 964.

CONCLUSION.

We submit, with deference, that the alleged tariffs introduced in evidence were not tariffs at all and without which there was no evidence whatever to support a verdict and judgment.

In *Creswill* v. *Grand Lodge K. of P.*, 225 U. S., 246, at page 261, the court says:

> "While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless, two propositions are as well settled as the rule itself, as follows:
>
> (a) That where a federal right has been denied as the result of a finding of fact which it is contended there is no evidence whatever to support and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the federal question, to analyze and dissect the facts, to the extent necessary to do so, the power exists as a necessary incident upon the claim of denial of the federal right."

Citing:

Kansas City Southern v. *Albers*, 223 U. S., 573.

Cedar Rapids Gas Light Co. v. *Cedar Rapids*, 223 U. S., 655.

Washington ex rel. Oregon R. & N. O. v. *Fairchild*, 225 U. S., 111.

If after examining the evidence pursuant to these authorities the court shall conclude the alleged tariff or tar-

iffs were illegal, that fact alone would justify a reversal, but on the other hand, if the court should conclude that they are entirely valid and in compliance wtih the Interstate Commerce Act, yet the fact that the cars had not reached their destination at the time when the demurrage was assessed would warrant a reversal.

We submit that the action of the trial court in directing a verdict against plaintiff in error and entering judgment thereon and the action of the Appellate Court in affirming it so clearly denies to plaintiff in error a right, title, privilege and immunity claimed under the Interstate Commerce Act as in force at the times of the various shipments involved, that it must be reversed.

All of which is respectfully submitted.

Edward D. Comm

Henry T. Master

Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 92

BERWIND-WHITE COAL MINING COMPANY,
Plaintiff in Error,

vs.

CHICAGO & ERIE RAILROAD COMPANY,
Defendant in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

EDWARD D. POMEROY,
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IN THE

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REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

In replying to the argument of counsel for defendant in error, we will treat the subjects in the same order as observed by counsel in their printed argument.

I.

"DEFENDANT IN ERROR HAVING FILED WITH THE INTERSTATE COMMERCE COMMISSION, ITS DEMURRAGE RULES AND STATEMENT OF CHARGES, WAS NOT ONLY ENTITLED BUT REQUIRED TO COLLECT DEMURRAGE CHARGES IN ACCORDANCE THEREWITH."

Counsel assert that "it is not claimed or even suggested by plaintiff in error that the amount of demurrage charges in question did not accrue."

Our contention is that demurrage charges upon interstate shipments never accrue unless there is a tariff authority therefor. It is not every case where cars are held in waiting that demurrage is charged. In fact, it is quite common for railroads to hold carload shipments at some points without charging it, or to file demurrage tariffs covering a certain point at one season of the year and withdraw them at another season, or to charge demurrage upon one commodity and not upon another, or to give longer free time upon one commodity than another, or to give longer free time at one station than is given at another. The supposed car service rule in evidence in this case is an apt illustration, in which forty-eight hours' free time is given upon some commodities and seven days' free time for others. It also shows that the free time on coal was changed from seven days to five days, all of which goes to prove that there is no hard and fast rule as to the conditions under which demurrage will be charged, or as to whether it will be charged at all. That these facts are governed entirely by the tariffs, and if there is no traiff, there is no way of fixing either the conditions under which the charge will be made or the amount thereof.

But counsel say there is no claim that the charge "was not reasonable or the usual one." No such contention has been made for the simple reason that no such question is involved in this case, and the case was not tried by either of the parties upon any such theory. The Supreme Court has held in *Texas & Pacific Ry.* v. *Abeline Cotton Oil Co.*, 204 U. S., 426, 448, and a number of other cases, that *no court* has the power to determine the *reasonableness* of a charge upon an interstate shipment. Suppose the Erie Railroad Company instead of offering a tariff in this case had sought to prove up what was the reasonable or usual charge for the service. Or suppose the

Berwind-White Coal Mining Company had sought to defend upon the theory that the charge was unreasonable. In either case, the court would have ruled out the evidence tendered upon the theory that no court has jurisdiction to determine that question, but that such jurisdiction rests exclusively in the Commission.

It is true that the Supreme Court of Illinois did, in the Schumacher case cited by counsel, determine the question of reasonableness, but that was upon an intra-state shipment, and decided under the law as it then existed in Illinois without reference to the Federal Act governing commerce, and is, therefore, not an authority in this case.

On page 7, the statement is made that the letter of August 30, 1904 (Exhibit 3), which mentioned the amount the charges would be, "was placed on file with the rules and under the same title." We do not know from what counsel draw this inference. There is no such evidence in the record, nor do we find anything from which it can justly be inferred. It is true that the writer placed upon it "L. C. C. A.-2427," but there is nothing to show what was done with it after reaching the secretary of the Commission. The letter of August 26 contained the same notation, yet there is certainly nothing in it that would make it a tariff, nor is there any contention that it was. Surely it will not be held that every letter written to the Commission by a carrier referring to a particular tariff becomes a part of such tariff simply because the writer has, for the purpose of identification, placed the tariff number upon it.

Nor is the contention sound that a failure to charge under this so-called tariff would necessarily have subjected the carrier to a penalty.

The quotation from the Act as inserted on page 8 is incomplete. The penalty attaches for charging a greater

or less rate than that specified "*in such published schedule.*" We think the words here quoted should be read with the quotation of counsel. If there was no "published schedule," we fail to see how any one could be guilty of violating the law by ignoring that which did not exist.

While it might be true that if charges were made against others under these so-called rules and they were wrongfully made, the parties so charged would have an action for the charges so assessed, yet that fact would not cause a tariff to exist which, in law and in fact, had no existence.

On page 11 counsel indicate that there is an effort on the part of plaintiff in error to escape the charges which competing coal dealers had to pay. There is no proof as to what any other shipper had to do. West Virginia Coal comes into Chicago over various routes and there is sharp competition among carriers for the traffic, and each of which would charge demurrage if the tariff in question were effective according to "its schedule of rates." There is no showing that any other shipper had any coal come in over the Erie, or that it charged him demurrage if any did come in over its routes. In fact, if the tariff in question was illegal and no such charge could lawfully be made, the presumption would be that they did not make such a charge.

It is probably true, as contended by counsel, that the Interstate Commerce Act itself does not fix the form and size of the schedules to be printed, yet it does provide in express terms that "the rates and fares and charges" (Sec. 6) must be shown, which was not done in the supposed tariff in this case, unless the letter of August 30, 1904, be considered a tariff, and the fact that upon the reconsigning orders there appears the words "we pay car service" could make no difference, because the ship-

per would be obliged to pay the demurrage if any legally existed, whether it agreed to or not, and would not be obliged to pay it if no legal charge existed, even though it had agreed to do so.

We fail to perceive counsel's argument on pages 11 and 12 to the effect that the cancellation of all the rules which support a charge and the substitution of new rules is no change in the "rate." Of course, there is nothing in the record to show what the old rules were or how much the charge was, but any change in free time or in any other of the rules usually contained in demurrage tariffs would effect the charge to the shipper, which we understand to be the "rate" even though the charge per day might remain the same.

Counsel are in error in their contention that our objection to the supposed tariff is that it was not posted in two public and conspicuous places in each depot of the company, and on page 20 of the brief filed for plaintiff in error, we expressly disclaim any such contention, and there state what the quotation on page 15 of the argument of defendant in error seems to bear out, namely, "The filing of the schedules with the Commission *and* the furnishing by the railroad company of copies to its freight offices" create the tariff, and not simply the filing with the Commission without any distribution to be filed, as was done in this case.

II.

"EVEN THOUGH THE DEMURRAGE RULES AND CHARGES FILED WITH THE INTERSTATE COMMERCE COMMISSION WERE IN CERTAIN RESPECTS INFORMAL, YET SUCH FACT WOULD NOT EXCUSE PLAINTIFF IN ERROR FROM PAYING THE CHARGES HERE IN QUESTION, AS THEY WERE THE REGULAR AND USUAL CHARGES FOR SUCH SERVICE."

Under this part of the argument for defendant in error, counsel have devoted themselves largely to an argument with reference to the usual and customary charge. We have argued this subject elsewhere in this brief, but counsel make the statement that the "Commission and the Courts" have held that in the absence of a tariff or where there is a defective tariff, the shipper must pay the usual and customary charge, and cite certain rulings and opinions by the Commission to sustain their contention. In each of these cases the matter arose before the Commission upon a complaint asking for reparation, or that money which had been paid should be returned, and in each instance the Commission exercised the power which rests in it exclusively and fixed a reasonable rate or determined that the rate which had been paid was reasonable according to the facts of each particular case, but there is no case of which we are advised in which "the Courts" have entertained any such jurisdiction and for the very simple reason that they are deprived of this jurisdiction by the Interstate Commerce Act. And even the Commission will not, in all cases, exercise such jurisdiction in favor of the carrier, for as stated by counsel on page 21 of their argument, in an attempt to distinguish the case of *United States* v. *D. & R. G. Ry.*, 18 I. C. C. R., 9, from the case at bar, it depends upon whether or not it is an "ordinary or cus-

tomary charge," but in that case it is plainly held that demurrage assessed before the shipment arrives at destination is not the usual and ordinary charge, and therefore, is illegal unless specified in the tariff, and the Commission held in *England & Co.* v. *B. & O.*, 13 I. C. C. R., 617, that a tariff providing for storage (which is the same as demurrage) which failed to fix the amount of the charges was illegal and no charge could properly be made under it.

III.

"AS TO THAT PORTION OF THE DEMURRAGE CHARGES AMOUNTING TO $1,163.00 WHICH ACCRUED PRIOR TO THE HEPBURN AMENDMENT, THE QUESTION OF TARIFFS IS NOT CONTROLLING."

Under this subject counsel apparently concede that if the tariff in question was so defective as to amount to no tariff, the portion accruing subsequent to the Hepburn Amendment would be illegal, but that the portion accruing prior thereto would be properly collected for the reason that the Hepburn Amendment provided that no carrier "shall engage in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges * * * have been filed or published in accordance with the provisions of this Act," thus inferring that under the old Act in the absence of a tariff, a carrier could enter into such contract as it desired, or make any charge which was reasonable for the service performed, by subjecting itself to a penalty.

Section 6 of the old Act provided that every common carrier "*shall* print and keep open to public inspection" and made it unlawful to "charge, demand, collect or receive, * * * a greater or less compensation * * * than is specified in such published schedule." And Sec-

tion 10 subjects the carrier to penalties for violating the Act either by doing that which is forbidden or failure to do that which is directed by the Act to be done.

It necessarily follows that without the filing and publication of a tariff, no charge could be made without violating the express terms of the Act, and that any such charge would therefore be illegal.

The principle of law is well settled that no action can be maintained in which the plaintiff, to make out his case, must necessarily invoke aid from an illegal demand or contract. See *Penn* v. *Bornman*, 102 Ill., 323-330; *Miller* v. *Ammon*, 145 U. S., 426, and cases therein cited.

No authority is cited by counsel in support of their contention, the proposition seems, however, to have been settled in the case of *Chicago & Alton Railroad Company* v. *Kirby*, 225 U. S., 155. That case arose on January 24, 1906, which was prior to the Hepburn Amendment. The court there held a contract void because there was no tariff to support it. If counsel's contention is correct, that in the absence of a tariff the carrier could under the old Act make any charge or contract it pleased, thereby merely subjecting itself to a penalty, then the contract in the Kirby case would have been upheld.

IV.

"THE DEMURRAGE CHARGES IN QUESTION WERE PROPERLY ASSESSED ON THE CARS WHILE THEY WERE BEING HELD IN THE YARDS AT HAMMOND, AS THOSE YARDS WERE THE REGULAR CHICAGO HOLDING YARDS FOR CARLOAD FREIGHT HELD FOR RECONSIGNMENT."

The record is silent as to just how far from the City of Chicago the City of Hammond is located, but we think

counsel are in error when they state that the two cities join each other. Their location is a geographical fact of which courts take judicial notice. Our best information is that the City of Hammond is about two miles southeast of the extreme southeast corner of Chicago and that by the route of the Erie Railroad it is even farther, at any rate the switch yard of the Erie is more than two miles outside the extreme southeast corner of Chicago.

Counsel seem to have the idea that if a tariff is so framed that it covers demurrage charges at several points in a given district, deliveries destined to one point in the district may be delivered to another point in the district and demurrage assessed, and therefore, because Chicago and Hammond are in the same district, deliveries destined to Chicago may be stopped at Hammond and demurrage assessed there.

The same district in this case included Waukegan, which as counsel say "is many miles north of Chicago," page 27. If this rule applies to one point in the district, it applies to all and we do not think it could be reasonably contended that the cars in question could have been delivered at Waukegan and demurrage assessed there.

Moreover, the same contention was made in the case of *U. S.* v. *D. & R. G. Ry. Co.*, 18 I. C. R. R., 9, with reference to the rules of the Utah Car Service Association, and the Commission there said where demurrage is assessed at a point other than that specified in the bill of lading, "there must be definite tariff authority therefor."

Conclusion.

The persistence with which counsel argue propositions not here involved, namely, that the cars were handled in the regular and usual way, and that there was no damage done by the failure to comply with the law as to tariffs, and that the charges were the regular and usual charges, is somewhat surprising, in view of the fact that the case was not tried by either of the parties upon any such theory, and proof of such facts would not have made a case for the plaintiff nor would proof that such facts did not exist have been a defense for the defendant. It is plain that these matters are urged merely for the purpose of giving the impression that the defenses are all purely technical and not upon the merits.

What warrant is there in the record to support any such inference? The plaintiff in this case framed the issues and introduced the proof which the defendant must meet, namely, that there was a legal tariff and that the charges had been assessed in accordance with its provisions.

Suppose the defendant, to meet these issues, had introduced proof along the lines suggested by counsel to the effect that the charges assessed were not the usual or customary charges and that the cars were not handled in the regular way and that some damage had been done to the defendant by reason of the failure of the plaintiff to comply with the law as to tariffs, the court would have properly and promptly rejected such testimony as immaterial, because if a legal tariff did actually exist, it governed the shipment and the charges absolutely, and neither of the parties could have, by any action of theirs, changed its terms or the effect it would have upon the shipment in question.

Where the defendant has met the only issues involved in the case, or rather where the plaintiff has failed to make proof of the facts necessary to make a case upon its own theory, we submit there is no excuse for the statement that the case was not tried upon the merits.

Respectfully submitted,

Edward S. Pomeroy.

Henry T. Martin

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 92

BERWIND-WHITE COAL MINING COMPANY,
Plaintiff in Error,

vs.

CHICAGO & ERIE RAILROAD COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

CASES CITED.

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BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

While the statement of facts set forth in plaintiff in error's brief is in the main correct, yet a number of material facts have been omitted therefrom and we are therefore making in some detail a statement of the facts as we understand them to be shown by the record.

This suit was originally brought by the Chicago & Erie Railroad Company, defendant in error, in the Municipal Court of Chicago, to recover demurrage or car service charges amounting to $1,785, on one hundred and forty-eight carloads of coal, said

charges accruing while the cars in question were being held in defendant in error's yards at Hammond, Indiana, awaiting reconsignment orders from plaintiff in error. These yards at Hammond are and for many years have been the regular Chicago yards of defendant in error for the holding for reconsignment of carload shipments of the character involved.

The cars in question were shipped by plaintiff in error from Berwind, West Virginia, and vicinity, consigned to itself flat at Chicago, the shipments covering a period from May 10, 1906, to December 7, 1906. Sixty-eight of the cars (on which $1,163 of the amount of the charges was assessed) were shipped and delivered prior to August 29, 1906, the date the Hepburn amendment to the Interstate Commerce Act became effective, and the balance of the cars (on which $662 of the amount of the charges was assessed) were shipped subsequent thereto. (Trans., 105-106.) Plaintiff in error had no storage yards or tracks in Chicago where cars could be stored (Trans., 53-54), and defendant in error's holding yards for carload freight billed flat to Chicago (which was the way the cars in question were billed) are at Hammond, which is on the belt lines running around the City of Chicago, and all cars so billed are held in the yards at that point for reconsignment. (Trans., 61-62-63.) They are never brought into the terminals of the city, and if so brought in they would simply have to be hauled out again to the belt lines for reconsignment.

This method of handling carload shipments of

the character in question had been in vogue for twenty years or more. (Trans., 61-63.) In fact, it dated back further than the memory of any witness who testified. From time to time as the cars arrived at Hammondl, defendant in error sent to plaintiff in error notices of the arrival of the cars, same being delivered to plaintiff in error at its office in the Fisher Building in Chicago, and plaintiff in error, after receipt of these notices, from time to time mailed to defendant in error's agent at Hammond reconsigning orders directing defendant in error where to send the cars. This was done in the case of each and every car. These reconsigning orders were all offered in evidence, and there was typewritten by plaintiff in error at the bottom of each of these reconsigning orders the words: "*We pay car service,*" or, "*Send car service bill to this office for collection.*" A number of these reconsigning orders are printed in full in the transcript of record at pages 56, 57 and 58. Under these reconsigning orders defendant in error was directed to and did send the cars of coal in question to various points on the various belt lines on the north, east and south sides of Chicago, and also Elgin, Summerdale and other points outside of the city. (Trans., 106.) During the time in question demurrage charges at the rate of one dollar per day, after deducting the free time of five days allowed for reconsignment on each car and holidays as provided in the rules, to the amount of $1,785 accrued.

At and for several years prior to the time the cars in question were shipped defendant in error had on file with the Interstate Commerce Commis-

sion at Washington, D. C., a copy of the car service rules under which demurrage was assessed in the Chicago territory, and a statement specifying that the charges would be *one dollar* per day per car. Certified copies of these rules, notices, etc., were received in evidence and are set forth in full on pages 21 to 31 of the transcript. No evidence whatever was offered by plaintiff in error, and the court directed the jury to find the issues in favor of the defendant in error, and as there was no dispute as to the amount in question, it assessed the damages at the sum of $1,785. Judgment was entered on the verdict and appeal taken by plaintiff in error to the Appellate Court in and for the First District of Illinois. The Appellate Court affirmed the judgment and plaintiff in error filed petition for certiorari to the Supreme Court of the State of Illinois, which petition was denied, this under the rules of practice in Illinois being an affirmance of the judgment of the Appellate Court.

ARGUMENT.

I.

DEFENDANT IN ERROR HAVING FILED WITH THE INTERSTATE COMMERCE COMMISSION ITS DEMURRAGE RULES AND STATEMENT OF CHARGES, WAS NOT ONLY ENTITLED, BUT REQUIRED TO COLLECT DEMURRAGE CHARGES IN ACCORDANCE THEREWITH.

At the outset it is to be noted that it is not claimed or even suggested by plaintiff in error that the amount of demurrage charges in question did not accrue while the cars were being held awaiting reconsignment, or that the charge made was not reasonable or the usual one, or that the cars were not handled in the regular or usual way. The only defenses urged by plaintiff in error do not go to the merits of the case but are purely technical, its contention being that it should not be required to pay this demurrage first, because the rules, charges and notices, etc., which the defendant in error had on file with the Interstate Commerce Commission were in certain respects informal or did not in certain technicalities comply with the rules of the Commission; and second, because defendant in error held the cars at its regular Chicago storage yards awaiting reconsignment and did not actually bring them into the downtown terminals of the City of Chicago.

That these claims are wholly without merit must, we think, be at once apparent. The facts bearing

on the question of the sufficiency of the rules, charges, etc., on file with the Commission, and concerning which there is no dispute, show that at and for a long time prior to the shipments in question there was in existence an association composed of the various railroads entering Chicago, known as the Chicago Car Service Association, and it had formulated and published in pamphlet form certain rules applicable to demurrage or car service charges in the territory at and around Chicago, said territory extending from Waukegan on the north to Griffith and Edgemore, Indiana, on the south and east (Trans., 21). A copy of these rules, which were entitled "Car Service and Demurrage Rules," is set out in full on pages 21 to 27 of the transcript of record. On page 3 of this pamphlet (Trans., 21) appear the names of the various railroads comprising the association, including that of defendant in error and also a description of the territory covered by the association. In this pamphlet are set forth clearly and in detail the rules under which demurrage on cars brought within the territory should be assessed.

These rules had been in force and demurrage collected under same for many years, and as far back as 1902, the Illinois Supreme Court in the case of *Schumacher* v. *C. & N. W. Ry. Co.*, 207 Ill., 199, had these rules before it and held that under them the carriers were entitled to collect car service or demurrage charges, and that one dollar per day per car was a reasonable charge.

Under date of August 29, 1904, approximately two years before the shipments here in question were

made, the defendant in error, Chicago & Erie Railroad Company, filed a copy of said rules with the Interstate Commerce Commission and same was entitled and filed as *Erie R. R., I. C. C. No. A-2427.* (Trans., 20.) In this pamphlet the amount of the charge was not specified, but on September 1, 1904, or three days later, it also filed with the Commission a statement referring specifically to said rules and under the same number and title, which is in part as follows:

> "In connection therewith beg to advise that our rates will be, car service *one dollar per car per day* or fraction thereof."

This statement was placed on file with the rules, and under the same title, *i. e., Erie R. R., I. C. C. No. A-2427.* Later, under date of October 18, 1905, an amendment was filed changing the free time allowed for reconsignment, and from time to time various other amendments not material here were made. (Trans., 30-31.) These rules, charges, notices, etc., remained on file and in force and were operated under until February 20, 1907, they at that time being canceled by the filing of Erie R. R., I. C. C. No. A-3635. (Trans., 31.) These documents, as will be observed, are all in plain legible type. The rules and regulations therein contained are clearly and specifically set forth and can easily and readily be understood, and are such that any one desiring to find out from the Interstate Commerce Commission what the rules and demurrage charges at Chicago were, could readily have done so. There can be no serious question but that the filing of the above rules, charges, notices, etc.,

was a substantial compliance with the provisions of the Interstate Commerce Act, with reference to the filing of schedules, etc.

The purpose of the act was not to give or take from carriers the right to make and collect demurrage charges (a right which already existed at common law), but its chief if not sole purpose was to secure uniformity of charge to all shippers and to do away with discrimination and preferences.

In speaking of the purpose of the act, Mr. Justice Van Devanter said in *Kansas City S. Ry. Co.* v. *Albers Commission Co.*, 223 U. S., 573:

> "The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force."

The filing by defendant in error of the demurrage rules and regulations and statement of the demurrage charge to be made, made such charge public and effective and complied with and accomplished the purpose of the Interstate Commerce Act in establishing a demurrage charge which should be uniform to all shippers. Certainly no one will contend that while these charges and rules were on file the railroad company could have made any greater or less charge than one dollar per day without violating the act, for it is provided in Sec. 6 of the Interstate Commerce Act as amended in 1889 that where rates have been filed "*It shall be unlawful for such common carrier to charge a greater or less rate than*

that specified." Had the railroad attempted to charge a shipper more than one dollar per day demurrage, proof of the filing of the documents in question would have been a complete defense. Likewise had it charged less than one dollar per day, it would have been guilty of discrimination and subject to punishment under the provisions of the act, and it is at once apparent that in this case to permit plaintiff in error to escape paying the demurrage charges which admittedly accrued, would be to permit and foster the very discrimination and preference which the act was passed to obviate, and plaintiff in error is here simply seeking to obtain a preference and escape the payment of demurrage charges the justness and reasonableness of which it does not dispute, and which its competitors were required to pay by merely attempting to point out informalities in the rules and charges filed. The first criticism of counsel for plaintiff in error (p. 14 of their brief), is as to the style and form of the documents themselves with reference to size, shape and type. As heretofore indicated, these were all printed in plain, legible type, and the rules therein contained clearly and succinctly stated, and certainly followed and complied with the requirements of the Interstate Commerce Act in that respect. Besides, as we understand it, there is no special form, no special size of paper, no special kind of type or color of ink essential to the validity of a tariff, but all that is required is that a plain *legible statement of the rules and charges be filed*, and in this connection we also beg to suggest that we do not believe it was the province

of the court to attempt to specify or fix the particular form or style of tariffs, or to fix the size of the type with which they are to be printed, for if so every court before whom a case involving tariffs and charges was tried might have different ideas in this respect, and the result would be chaos. Besides, under the act it is the Commission alone which has power to determine the form and style, the provision of the act both before and after amendment in that respect being as follows:

> "The Commission may determine and direct the form in which the schedule required by this section (6) to be kept open to public inspection, shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

The rules and statement of charges in question were accepted and filed by the Commission, and remained on file without change except as to an amendment to the rule relative to free time allowed for reconsignment, for nearly three years, and demurrage was assessed in accordance therewith.

It is asserted by counsel that the publications in question did not suffice to give the shipping public notice of the fact that car service charges were being made. The futility of these assertions is shown by the record, for it clearly appears that plaintiff in error itself at least knew of the rules and regulations with reference to demurrage, and made its shipments and transacted its business with them in mind, for in the case of each and every car involved plaintiff in error gave to the railroad company shipping or reconsigning orders on each of which it had itself written the words, "*We pay car service*," or

words of similar import. Yet in the face of this it is asking the courts to excuse it from paying charges which competing coal dealers had to pay, because the rules and charges filed did not give it sufficient notice of their existence.

Counsel also (p. 16 of their brief), make the criticism that sufficient notice of the time of their becoming effective was not given at the time the rules and charges were originally filed back in 1904, and call attention to the rule in the act then in force, requiring ten days' notice of any change making an increase in a rate, and three days' notice of any change making a decrease in a rate. This criticism is wholly without merit, for the rules and statement of charges in question which were filed in 1904, did not purport to, nor did they make any change whatever in any rate, and consequently did not require any notice at all. In their brief at pages 16-17, counsel state that in a letter accompanying the rules filed September 9, 1904, it was stated that they canceled some former *rate*. This is an oversight on the part of counsel, for the letter in question (Trans., 29) made no reference whatever to rates, but simply referred to rules, and there is no suggestion anywhere of any increase or decrease in rates, nor do counsel claim that there was, and unless there was a change increasing or decreasing a rate, no notice of any kind was required. As the record shows, the only change made in the rules which affected in any way the rate or charges in question, was the amendment filed October 25, 1905, changing the free time allowed for reconsignment from seven to five days. (Trans., 28.)

The rule as amended (rule 7) is shown at page 24 of the transcript. This amendment was filed October 25, 1905, and notice therewith given that it would become effective November 15, 1905, or more than twenty days thereafter, which was longer notice than required by the statute. Besides, the requirement as to notice is simply to give shippers time to adjust themselves to changes and it is to be noted that in this case the rules and charges had all been on file for a long period of time, the original more than two years before the shipments in question were made and any claim of too short a notice is wholly idle.

Counsel also call attention, page 17 of their brief, to what purports to be a refiling of certain rules, etc., on Sept. 12, 1906, and state that thirty days' notice as required by the Hepburn Act, then in force, was not given. It is not claimed, however, that this had any bearing on the case, and it could not. There did not purport to be and was no change in the rates requiring notice, and if sufficient notice had not been given the situation would not be changed, for the old rules would simply have remained in force, and those were the ones under which the charges were made.

So far as the charge of one dollar per day per car is concerned, there does not appear to ever have been any change. In fact, this has always been recognized by the Interstate Commerce Commission as the regular and proper charge for services of this character. In *Kehoe* v. *R. R. Co.*, 11 I. C. C. Rep., page 166, which was decided in 1905, or shortly before the shipments here involved moved, the Commission, after holding that demurrage charges are

not based upon the rental value of cars, but are rather in the nature of a penalty, said, p. 170:

> "* * * One dollar per day is the demurrage charge universally named by car service associations in all parts of this country in case of carload freight, and the same amount is generally if not uniformly fixed by railroad commissions invested with power to make rates and regulations."

Other criticisms, trivial in their nature, are also made, as for instance, it is stated (p. 18, plaintiff in error's brief) that the copy of rules filed was not sufficient, because it did not state on its face that it was a tariff, and also that no time was given as to when it became effective. An examination of this document shows that on the front page of same appears the title, "Chicago Car Service Association. Car Service and Storage Rules" (Trans., 21); and when the same was filed it was entitled and filed as Erie R. R. Co., I. C. C. No. A-2427, which is substantially the way all tariffs, even at the present time, are entitled. They also purported on their face to become effective Sept. 1, 1904, and it is so stated in the notice to the Commission when they were filed.

In considering the question of the sufficiency of these publications it must also be borne in mind that they were filed in 1904 and 1905, prior to the time the Hepburn Act went into effect, and at that time there were no rulings and decisions to serve as guides as to the details and technicalities to be observed in the making and filing of tariffs. Since then, however, the power and scope of the Interstate Commerce Commission has been broadened, and from time to time rules and changes in rules in ref-

erence to the form and contents of tariffs, have been made. The fact, however, is that the publications in question were plain, legible and easy to be understood by any one seeking information as to demurrage charges in the Chicago territory. In truth they are plainer, more legible, and more easily understood, than most of the tariffs of the present day, many of which are so involved and intricate as to require the services of an expert for interpretation.

So far as these rules and charges are concerned the only other criticism to which we care to refer is that which goes to the question of posting and publication, etc.

It is urged by counsel, beginning page 19 of their brief, section II, that the tariffs or rules and regulations in question never became established because they were not properly published, the objection being that it was not shown that they were posted in two conspicuous places in the various depots of the company and furnished and kept open for public inspection. This objection has already been answered by this court in a number of decisions, and it has been uniformly held that the publication required by the act, and the thing which puts a rate into effect, is the filing of it with the Interstate Commerce Commission, and that the other provisions, *i. e.*, the requirement to post in two conspicuous places in depots and keep open for public inspection, etc., were not conditions precedent to the establishment of a rate but were provisions based upon the existence of an established rate and for the purpose only of affording special facilities to the public for ascertaining the rates actually in force. The rates, however,

become effective and binding both on the carrier and the shipper when they have been filed with the Commission.

The identical question here presented was passed upon in the case of *I. C. R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S., 441. In that case the Henderson Elevator Company as plaintiff in the court below, brought suit against the Illinois Central Railroad Company to recover loss alleged to have been sustained by an erroneous quotation by the agent of the railroad company, and it was claimed that this loss was occasioned and brought about by defendant's failure to have *posted* or *on file* in its office in Henderson, Ky., its freight tariff rate in question. The tariff, however, was on file with the Interstate Commerce Commission, and the court held that that fact made the tariff effective and binding and that no damages could be recovered by reason of the fact that the rates were *not posted* or *kept on file in the station.*

This question was also presented in the case of *Texas & Pacific R. R. Co.* v. *Cisco Oil Mill*, 204 U. S., 449, 51 L. Ed., 562. The court in deciding the question said:

> "The contention is without merit. The filing of the schedule with the Commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary.
>
> *The requirement that schedules should be posted in two public and conspicuous places in*

every depot, etc., was not made a condition precedent to the establishment and putting in force of the tariff rates, but was a provision based upon the existence of an established rate and plainly had for its object the affording of special facilities to the public for ascertaining the rates actually in force."

This same ruling was announced in *Kansas City S. R. R. Co.* v. *C. H. Albers Commission Co.*, 223 U. S., 594, 56 L. Ed., 567, in which case the court stated in part as follows:

> "Posting, however, was not essential to make rates legally operative, and is required only as a means of aording special facilities to the public for ascertaining the rates actually in force."

It is therefore clear that the publication of the rules, charges, etc., was in full compliance with the provisions of the Interstate Commerce Act, and they were in force and effect at the time the shipments in question were made, and binding on both carrier and shipper alike, and inasmuch as plaintiff in error did not dispute or contest the amount of the demurrage which accrued, the trial court properly directed the jury to find for the defendant in error, plaintiff below.

In the case of *Erie R. R.* v. *Wanaque Lumber Co.*, 69 Atl. Rep., 168, the court in discussing this question, said, on page 170:

> "It was shown that the car service rules had been duly filed with the Interstate Commerce Commission. A copy of these rules was in evidence, from which it appears that the charge of one dollar per car per day was prescribed as the demurrage or car service charge after forty-eight hours' free time for unloading. *Hence*,

the question was not open to the trial court, the defendants' duty in the premises, if they considered the charge unreasonable, being to appeal to the Interstate Commerce Commission for its modification (Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, and other cases), that body having jurisdiction of terminal charges as well as freight rates. *So that under the authority of these Federal decisions* the jury should have been instructed as matter of law that as the cars in question had come from another state the charge for demurrage must be regarded as reasonable in the absence of any adverse ruling by the Commission."

In numerous decisions this court has also held that where a rate has been published, as in the case at bar, the carrier is not only entitled to but required to assess and collect charges in accordance with the published rates. (See *Penn. Railroad Co.* v. *International Coal Mining Company*, 230 U. S., 184, and *Texas & Pacific R. R. Co.* v. *Mugg*, 202 U. S., 242.) And the act itself specifically so provides.

II.

EVEN THOUGH THE DEMURRAGE RULES AND CHARGES FILED WITH THE INTERSTATE COMMERCE COMMISSION WERE IN CERTAIN RESPECTS INFORMAL, YET SUCH FACT WOULD NOT EXCUSE PLAINTIFF IN ERROR FROM PAYING THE CHARGES HERE IN QUESTION AS THEY WERE THE REGULAR AND USUAL CHARGES FOR SUCH SERVICE.

It is not claimed by plaintiff in error that the rules and charges were not filed with the Interstate Commerce Commission, but the claim at most merely is that they were informal. Conceding, for the sake of

argument, that this were true, yet defendant in error was entitled to judgment in this case, for the Interstate Commerce Commission and the courts, have, for the purpose of carrying into effect the object for which the Interstate Commerce Act was passed, *i. e.*, the prevention of undue discrimination and preference, taken the position that the mere fact that a carrier has filed a tariff which is informal or defective, or in some cases, even failed to file a tariff at all, does not excuse the shipper from paying the *usual and customary charge*.

As has been heretofore indicated, it is not claimed that the demurrage charges in question did not accrue, or were not the usual and customary ones, and it also appears from the record that appellant not only knew that it was required to pay car service, but that it actually agreed to, for over its own signature in each and every one of the reconsigning orders covering the cars in question, extending over a period of more than seven months, it stated that it would *pay car service*, or else directed defendant in error to *collect car service* charges at its office.

Rule 194, Bulletin No. 4, of the published rulings of the Interstate Commerce Commission, is as follows:

> "The Commission will not entertain with favor claims for refund of demurrage charges collected in accordance with the *carrier's established practice, solely upon the ground that the demurrage tariffs were not on file with the Commission at the time the demurrage charges accrued.* The failure to file demurrage tariffs constitutes violation of the act, with which the

> Commission will deal through the department of prosecution."

In addition to this ruling, which clearly indicates the attitude of the Commission in reference to questions of this character, the Commission has had occasion to pass upon similar cases, and it has invariably held that the mere fact that the tariffs filed were informal or defective, did not excuse the shipper from paying the *usual and customary charges, for if it did it would simply amount to permitting one shipper to ship his goods free of charges, while a competitor, shipping on a different day or over a different line, would have to pay the customary charge, and in that way the discrimination which the Interstate Commerce Act was created to prevent would be fostered.*

In the case of *Memphis Freight Bureau* v. *Kansas City Southern Ry. Co. et al.*, Interstate Commerce Reports, Vol. 17, page 90, it was contended that the railroad company was not entitled to make any charges for refrigeration, because, while a tariff giving the freight rate was on file, there was no tariff filed which gave authority for refrigeration charges. The shipper had paid the refrigeration charges in question and had filed with the Interstate Commerce Commission a petition asking for its repayment. The Commission declined to order a repayment, holding that the shipper must pay the ordinary and customary charges notwithstanding the fact that no tariff had been filed, and said:

> "The rate of eighty-nine cents was duly published, but there was no tariff whatever for refrigeration. We hold that where a transporta-

tion service has been rendered, for which no tariff authority whatever existed at the time, and where the shipper has paid the sum claimed by the carrier for that service, *this Commission has jurisdiction to inquire what was a reasonable charge for the service, and to award repayment of whatever the carrier has collected over and above such reasonable charge.* It cannot order a repayment of the entre amount since the authority of this Commission only extends to the awarding of damages for violations of the act, *and certainly there are no damages in any proper sense of the word unless the shipper has been compelled to pay more than a reasonable rate.* Moreover, to hold that one shipper should pay nothing for his transportation, while his competitor shipping perhaps the next day must pay a reasonable charge *would be to permit and create the very discrimination which the act seeks to prevent.*"

Likewise, in *Blackhorse Tobacco Co.* v. *I. C. R. R. Co.*, Interstate Commerce Reports, Vol. 17, page 588, it was held that complainant was not deprived of his right to a reasonable rate by reason of the fact that the defendant, through neglect of the rules of the Commission, had *failed to publish their tariffs in legal form.*

In *Cudahy Packing Co.* v. *C. & N. W. Ry.*, 12 I. C. C. Rep., 446, an attempt was made to escape the payment of demurrage, because it was claimed the tariffs were defective. In that case it appeared that the R. R. Co. had filed its car service rules separately from its tariffs and the tariff sheets made no reference by number to the car service rules. It contained merely a simple provision that all shipments were subject to car service. The Commission said in its opinion:

> "*The failure to refer by number to the car service tariff in the tariff of rates could in no way relieve the complainant from the payment of demurrage.* The car service tariff was properly filed and posted and was *well known to the complainant. It was enforced against the public generally.*"

It thus appears from the conference rulings and decisions of the Interstate Commerce Commission above set forth that the mere fact that a carrier has failed to file tariffs, or has filed defective tariffs, does not permit a shipper to escape the payment of ordinary and usual charges made, but that for such failure to file tariffs the carrier will be dealt with through the department of prosecutions.

In special cases it has been held that the failure of the carrier to file tariffs covering certain charges would prevent them from making any charge for same, but those are all cases wherein the charge made was not an ordinary and usual charge but some special or extraordinary charge.

Such were the facts in the case of *United States* v. *D. & R. G. Ry. Co.*, cited by plaintiff in error on page 27 of its brief and other cases cited. In that case it was held that a demurrage not provided for in the tariff could not be collected, because the particular demurrage in question was *not an ordinary or customary charge*, and the Commission, in commenting on the case, said:

> "But a charge of this character is not the *usual practice of carriers*, and if established, must be published in their tariffs."

The rule is clear, however, that where, as in the case at bar, the charges *are the usual and customary*

ones they may and should be collected even though the tariff filed may be informal or defective for as before indicated, if not one shipper might escape the payment of any charges whatever, while another shipping over a different line or on a different day would be required to pay, and the discrimination which the act was intended to prevent would be fostered and promoted.

The reasons announced in the Supreme Court in the Cisco case, cited, *supra*, are applicable here, for the main purpose of the Interstate Commerce Commission is to prevent discrimination, no matter in what form it may appear, and it is obvious that it was not the intention of Congress that a mistake or oversight on the part of a carrier in the making up or filing of its tariffs should serve to permit one shipper to have his goods transported free of charge, while a competitor would have to pay.

III.

AS TO THAT PORTION OF THE DEMURRAGE CHARGES AMOUNTING TO $1,163, WHICH ACCRUED PRIOR TO THE HEPBURN AMENDMENT, THE QUESTION OF TARIFFS IS NOT CONTROLLING.

Before concluding our discussion of the question of tariffs involved, we beg to call the court's attention to the fact that as heretofore stated, $1,163 of the demurrage involved accrued on cars which were shipped and moved prior to the Hepburn amendment, and as to this amount defendant in error would be entitled to judgment wholly apart from any question of tariffs. The act then in force, *i. e.*,

the amendment of 1889, provided that carriers should file schedules of rates with the Interstate Commerce Commission, and that no greater or less charges should be made than provided in the schedules on file. There was, however, no prohibition against the transportation and handling of freight in the absence of tariffs. Provision was made that in case a carrier refused or neglected to file tariffs it could be required to do so by mandamus, and it was also subject to a penalty.

Under the Hepburn amendment, in addition to requiring the filing of tariffs, an entirely new provision was inserted, which provision is as follows:

> "No carrier, unless otherwise provided by this act, shall engage in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which same are transported by said carrier have been filed or published in accordance with the provisions of this act," etc.

Under this provision, which renders it illegal for carriers to transport goods without first having filed tariffs, it has been urged that until tariffs are filed no charges for transportation services can be collected. Under the former act, however, there was no prohibition against transporting goods or against making the regular charges therefor, but a penalty and special remedy for compelling the filing of tariffs was provided for, clearly indicating that it was intended that the remedy, in the event of failure or refusal to file tariffs, was punishment by fine or the enforcing by filing of mandamus, and it was not intended that the regular and usual charges for the services rendered could not be collected.

This, however, is not material, for in the case at bar defendant in error did have its rules and charges on file and was therefore authorized to collect and compel payment of charges in accordance therewith, but as above indicated, the fact that no tariffs were filed would not affect charges accruing prior to the Hepburn amendment.

IV.

THE DEMURRAGE CHARGES IN QUESTION WERE PROPERLY ASSESSED ON THE CARS WHILE THEY WERE BEING HELD IN THE YARDS AT HAMMOND AS THOSE YARDS WERE THE REGULAR CHICAGO HOLDING YARDS FOR CARLOAD FREIGHT HELD FOR RECONSIGNMENT.

Under section VIII of their brief, page 29, counsel for plaintiff in error make the contention, although we cannot believe seriously, that defendant in error was not entitled to collect the demurrage in question because the cars were held for reconsignment in the storage yards at Hammond and not brought into the physical limits of the City of Chicago. A mere statement of the facts will suffice to show that this contention is wholly groundless. All of the cars were billed flat to Chicago; that is they were cars subject to reconsignment, and the evidence, which is undisputed, shows that these yards at Hammond are the *regular Chicago holding yards* for cars consigned flat to Chicago, and *all* cars so consigned are held in these yards for orders. (Trans., 62, 63.) Such shipments are never brought into the city, and if they were they would only have to be hauled back again to the belt line upon reconsignment. (Trans.,

62.) This custom and practice of holding carload shipments billed flat to Chicago in these yards had been in force for more than twenty years. In fact so far as the record shows such has always been the custom for it, dated back beyond the memory of any witness who testified. (Trans., 61, 62.) In brief, these yards are, and always have been the *regular Chicago holding yards* for carload shipments held for reconsignment. In other words, these yards are the destination of such shipments.

On page two of plaintiff in error's brief it is stated that Hammond is twenty-one miles from defendant in error's Chicago terminals. This statement standing alone is misleading. There was no evidence as to just what the distances were, and while it is true that the downtown passenger and freight stations are some distance from Hammond, yet the freight and storage yards, as always is the case, are in the outlying districts, and the City of Chicago extends down to and adjoins Hammond and the yards in question, which, as the evidence shows, are and always have been the Chicago holding yards or terminals for the character of freight in question (Trans., 61-63); and, as above stated, if the cars in question had been brought down into the city they would simply have had to be hauled back again for switching to other lines when reconsigning orders were given (Trans., 62), and additional expense and trouble entailed and the traffic congested. *It further appeared that plaintiff in error did not have any storage yards or tracks in the City of Chicago, and could not have taken care of the cars if they had been brought into the city.* (Trans.,

52.) The cars were not only handled in the regular way that all similar cars are handled, but in the way plaintiff in error wanted them.

A list of the points to which the cars were finally reconsigned is given on page 106 of the transcript, and a glance at it shows that they were practically all reconsigned to points on other roads. Forty were reconsigned to the Peabody Coal Company via C. & N. W. Ry.; six to Swift & Company, via Chicago Junction Railway; others went to Elgin, Illinois, via C., B. & Q., Wheaton, Illinois, via C. & N. W., and so on. Not a single car was delivered to plaintiff in error itself, but all reconsigned. It is at once manifest that nothing could possibly have been more foolish or useless than to have hauled these cars away from the belt lines down into the city, and then back again for reconsignment. This claim, like every other claim advanced by plaintiff in error in this case, is wholly without justification or merit. It does not claim, or even suggest that it was in any way damaged or inconvenienced, or that the cars were not handled just as it wanted them. It knew how the cars were being held awaiting its orders, and sent its reconsigning orders to plaintiff in error at the Hammond yards without complaint, and in each order told the defendant in error to collect demurrage from it. That these yards were the proper and most convenient ones for holding cars for reconsignment at Chicago, and were, and always have been, the regular Chicago holding yards for shipments of this character, is not even questioned. Its claim simply is that because the cars were not shoved a few feet farther on into the physical lim-

its of the City of Chicago which is immediately adjacent it should be permitted to have them stored free of charge.

In addition, it is to be borne in mind that the demurrage rules on file with the Commission at the time in question did not cover merely the City of Chicago, but covered the entire territory of the Chicago Association (Trans., 24) commonly called the Chicago Switching District. This district extends from Waukegan, Illinois (which is many miles north of Chicago), to Griffith and Edgemore, Indiana, which are south and east of Chicago and Hammond.

The cases cited by counsel for plaintiff in error, *i. e., Staten Island Rapid Transit R. R. Co.* v. *Marshall*, 121 N. Y. Supr. Ct., App. Div., page 571, and *United States* v. *D. & R. G. Ry. Co.*, 18 I. C. C. Rep., 7, are not in point and do not uphold their contention. In both of those cases the facts were different, and besides the decision turned upon the provision of the tariffs in each case. In the Staten Island case the shipments were consigned to St. George, Staten Island, for unloading, and were held at Cranford, N. J., on a different railroad some twelve miles away. The demurrage rules specifically provided that demurrage would be charged at St. George, Staten Island, and there was no provision for demurrage at Cranford, the point where the cars were held. The court held that under this provision of the demurrage rules demurrage could not be assessed while the cars were being held at Cranford on a different line and at a point twelve miles away.

but it based its opinion entirely upon the provision of the rule, stating, in its opinion:

> "We are not concerned now with the question whether or not plaintiff might have made or might make rules charging demurrage for detention at Cranford, the only question is whether it has done so. This question must, we think, be answered in the negative."

In the case at bar the cars were held in the regular Chicago storage yard for cars held for reconsignment, and the demurrage rules specifically provided for the assessment of demurrage, not merely at Chicago, but in the entire switching district of Chicago, thus covering the cars where held. Likewise the situation is similar to the case of *United States* v. *D. & R. G. Ry. Co.* There the court held that the proper demurrage charge sought to be collected was not the ordinary and usual one, and that in order to enforce its collection there must have been definite tariff provision therefor and that there was not.

It would seem that no citation of authority was necessary in support of our contention as to this point. However, our Appellate Court, in *Woolner Distilling Company* v. *Peoria & Eastern Railroad Company*, 136 Ill. App., 149, held, under practically identical rules, that cars held in an adjacent and convenient storage yard were subject to demurrage. In addition to the fact that the proof shows that these yards in question where the cars were held were the proper and regular yards, the long custom and practice of more than twenty years of so using them would make them so.

In Hutchinson on Carriers, sec. 710, p. 793, vol. 2, it is said:

> "Railroad companies in common with all carriers may be excused from strict compliance with legal requirements in the manner and other circumstances of delivery by an established and known usage of their own, with reference to which the contract of carriage must be supposed to have been entered into."

Conclusion.

In conclusion we beg to say in all candor that the position taken by plaintiff in error is wholly devoid of merit. The evidence, which is undisputed, shows that the demurrage charges in question and rules under which they were assessed, had been on file with the Interstate Commerce Commission for a long time piror to the movement of the cars involved, thereby not only authorizing, but requiring defendant in error to make the charges in question. The evidence further shows that the cars were handled in the regular and usual way, being held in the yards at Hammond, which are the regular Chicago yards for the holding of cars subject to reconsignment, and yards which fall within the scope of the demurrage rules on file. It is not claimed or even suggested by plaintiff in error that it has been damaged or inconvenienced in the slightest, or that the charges made were not the regular and usual ones or that it was not familiar with them, or that the cars were not handled in the regular, usual and proper manner and just as it wanted them. It is not even claimed that the demurrage rules and charges were not on

file. The only claim advanced is merely that they were in minor respects informal. There can be no claim that they did not fulfill the purposes for which they were filed.

It is therefore respectfully submitted that the judgment of the lower court should be affirmed.

William Calhoun

Wm H. Lyford

Counsel for Defendant in Error.

Mr. Henry T. Martin, with whom *Mr. Edward D. Pomeroy* was on the brief, for plaintiff in error:

The booklet of the Chicago Car Service Association and the letters and circular which were mailed to the Interstate Commerce Commission do not constitute a tariff. *England & Co.* v. *Balt. & Ohio R. R.*, 13 I. C. C. 614; *Porter* v. *St. L. & S. F. R. R.*, 15 I. C. C. 4.

The alleged tariffs in question were never established. *Tex. & Pac. Ry.* v. *Cisco Oil Mills*, 204 U. S. 449; *Ill. Cent. R. R.* v. *Henderson Elevator Co.*, 226 U. S. 441.

The filing of papers with the Interstate Commerce Commission raises no presumption of approval. *Suffern Hunt & Co.* v. *I. D. & W.*, 7 I. C. C. 279; *San Bernardino* v. *A., T. & S. F. R. R.*, 3 I. C. C. 138–143, and cases *supra*.

Demurrage is governed by the Interstate Commerce Act. *Michie* v. *N. Y., N. H. & H. R. Ry.*, 151 Fed. Rep. 694; *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 722; *St. Louis & Iron Mt. Ry.* v. *Edwards*, 227 U. S. 265; *C., R. I. & P. Ry.* v. *Hardwick*, 226 U. S. 426.

There can be no charge for demurrage upon interstate shipments without a specific tariff authority therefor.

The published rate should govern and the value of a service cannot be fixed by agreement. *Chicago & Alton* v. *Kirby*, 225 U. S. 155; *N. H. R. Co.* v. *Int. Comm. Com.*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80–81; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 439; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *United States* v. *D. & R. G. R. R.*, 18 I. C. C. 7, 10; *Monroe & Sons* v. *M. C. R. R.*, 17 I. C. C. 27–29; *Crescent Coal Co.* v. *Balt. & Ohio R. R.*, 20 I. C. C. 569.

In the absence of a published demurrage rate, it is presumed that the through rate embraces terminal charges. *Int. Comm. Com.* v. *C., B. & Q. R. R.*, 186 U. S. 320, 328.

The purpose of the Interstate Commerce Act is to fix the rate absolutely and take it out of the realm of contract. The rates on file, being binding upon shipper and carrier

alike, *Penna. R. Co.* v. *International Coal Co.*, 230 U. S. 184, the statute required the carrier to abide absolutely by the tariff. Cases *supra* and *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467.

The tariffs are binding upon shipper and carrier alike. *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184.

The Interstate Commerce Act supersedes the common law with reference to interstate shipments. *St. L. & Iron Mt. Ry.* v. *Edwards*, 227 U. S. 265; *Chi., R. I. & P. Ry.* v. *Hardwick*, 226 U. S. 426.

Demurrage cannot properly be assessed until the shipment has reached its destination. *United States* v. *Denver & R. G. R. R.*, 18 I. C. C. 9; *Staten Island Ry.* v. *Marshall*, 136 N. Y. App. Div. 571; *Crescent Coal Co.* v. *Balt. & Ohio R. R.*, 20 I. C. C. 569.

The appellate court of Illinois is the highest court in which a decision could be had. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364.

The denial of a right under the Interstate Commerce Act gives this court jurisdiction. *Atchison, T. &c. Ry.* v. *Robinson*, 233 U. S. 173; *Chicago & Alton* v. *Kirby*, 225 U. S. 155.

The denial of a right under other Federal statutes is sufficient to give this court jurisdiction. *Seaboard Airline* v. *Duvall*, 225 U. S. 477; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *St. L., I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281; *Eau Claire Bank* v. *Jackman*, 204 U. S. 522; *Nutt* v. *Knut*, 200 U. S. 12; *Charleston &c. Ry.* v. *Thompson*, 234 U. S. 576.

The alleged tariffs introduced in evidence were not tariffs at all and without which there was no evidence whatever to support a verdict and judgment. *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Kansas City Southern* v. *Albers*, 223 U. S. 573; *Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; *Oregon R. & N. Co.* v. *Fairchild*, 225 U. S. 111.

Mr. Edward W. Rawlins, with whom *Mr. William J. Calhoun* and *Mr. Will H. Lyford* were on the brief, for defendant in error:

Defendant in error having filed with the Interstate Commerce Commission its demurrage rules and statement of charges, was not only entitled, but required to collect demurrage charges in accordance therewith.

Even though the demurrage rules and charges filed with the Interstate Commerce Commission were in certain respects informal, yet such fact would not excuse plaintiff in error from paying the charges in question, as they were the regular and usual charges for such service.

As to that portion of the demurrage charges which accrued prior to the Hepburn Amendment, the question of tariffs is not controlling.

The demurrage charges in question were properly assessed on the cars while they were being held in the yards at Hammond, as those yards were the regular Chicago holding yards for carload freight held for reconsignment.

In support of these contentions, see *Blackhorse Tobacco Co.* v. *Ill. Cent. R. R.*, 17 I. C. C. 588; *Cudahy Packing Co.* v. *C. & N. W. Ry.*, 12 I. C. C. 446; *Erie R. R.* v. *Wanaque Lumber Co.*, 69 Atl. Rep. 168; 2 Hutchinson on Carriers, § 710; *I. C. R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573; *Kehoe* v. *Railroad Co.*, 11 I. C. C. 166; *Memphis Freight Bureau* v. *Kansas City So. Ry.*, 17 I. C. C. 90; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *Schumacher* v. *Chi. & N. W. Ry.*, 207 Illinois, 199; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *Tex. & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 446; *Woolner Distilling Co.* v. *Peoria & P. R. R.*, 136 Ill. App. 479.

Memorandum opinion by direction of the court by Mr. Chief Justice White.

The judgment which is under review awarded demur-

rage on carloads of coal shipped by the plaintiff in error from West Virginia to Chicago, there to be reconsigned. (171 Ill. App. 302.) There are only two alleged Federal contentions:

1. That allowing the demurrage conflicted with the Act to Regulate Commerce because no tariff on the subject was filed or published. The fact is that the railroad had complied with the law as to filing tariff sheets and had also long before the time in question filed a book of rules of the Chicago Car Service Association, of which it was a member, relating to liability for demurrage and a few days after had written the Commission a letter stating that the demurrage charge would be one dollar per day. The argument is that such documents were not sufficiently formal to comply with the law and hence afforded no ground for allowing demurrage. But the contention is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that as a matter of fact they were adequate to give notice. Equally without merit is the insistence that there was no proof that the documents were posted for public inspection. *Texas & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 594; *United States* v. *Miller*, 223 U. S. 599.

2. Conceding that a tariff concerning demurrage was filed, it is insisted it only authorized demurrage at destination and the cars never reached their destination, but were held at a place outside of Chicago. The facts are these: The storage tracks of the railroad for cars billed to Chicago for reconsignment were at Hammond, Indiana, a considerable distance from the terminals of the company nearer the center of the city, but were convenient to the belt line by which cars could be transferred to any desired new destination, and the holding on such tracks of cars consigned as were those in question was in accordance with

a practice which had existed for more than twenty years. Under these circumstances the contention is so wholly wanting in foundation as in fact to be frivolous.

Affirmed.

BERWIND-WHITE COAL MINING COMPANY *v.* CHICAGO AND ERIE RAILROAD COMPANY.

ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

No. 92. Argued December 3, 1914.—Decided December 14, 1914.

Filing with the Interstate Commerce Commission the book of rules as to demurrage of the Car Service Association, of which the railroad is a member, with a statement as to what its rates will be, *held*, in this case, to be a compliance with the provisions of the Act to Regulate Commerce requiring filing of tariff sheets, no objection having been taken as to form, and it appearing that the documents were adequate to give notice and that there was proof of posting.

Although cars billed for reconsignment may not have actually reached the point named as destination, demurrage may attach for the time held after reaching the point convenient to the belt line for transfer where, under usual practice for many years, cars so billed were held for reconsignment.

171 Ill. App. 302, affirmed.

THE facts, which involve questions of filing tariff sheets under the Act to Regulate Commerce and the right of the railroad company to collect demurrage, are stated in the opinion.